

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 09-50026(REG)

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5 In the Matter of:

6

7 GENERAL MOTORS CORPORATION,

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9 Debtors.

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12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 February 28, 2012

18 9:56 AM

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20 B E F O R E:

21 HON ROBERT E. GERBER

22 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Motion of Wilmington Trust Company, (I) as GUC  
2 Trust Administrator, to (A) Liquidate New GM Securities for  
3 the Purpose of Funding Fees, Costs and Expenses of the GUC  
4 Trust and the Avoidance Action Trust, and (B) Transfer New  
5 GM Securities to the Avoidance Action Trust for the Purpose  
6 of Funding Future Tax Liabilities, and (II) as Avoidance  
7 Action Trust Administrator, the Approve an Amendment to the  
8 Avoidance Action Trust Agreement - Evidentiary Hearing

9  
10 Hearing re: Status Conference re: Nova Scotia Issues

11  
12 Hearing re: Motion of Motors Liquidation Company GUC Trust  
13 Pursuant to 11 U.S.C. Section 107(B) and Fed. R. Bankr. P.  
14 9018 For An Order Authorizing Filing of Complaint Under Seal  
15 - Discovery Conference

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning, have seats, please.

4 Have seats everybody.

5 I see some of you have decided to take the front  
6 counsel table before hearing how I want to handle things  
7 today.

8 We're going to deal with them in an order  
9 different than those that I have on the calendar and on the  
10 agenda. I want to hear the Nova Scotia matters first.  
11 Let's have everybody come up for that purpose, please.

12 (Pause)

13 THE COURT: After you get organized I want to get  
14 appearances and then I want you to sit down.

15 MR. FISHER: Your Honor, Eric Fisher and Katie  
16 Cooperman from Dickstein Shapiro for the GUC Trust.

17 THE COURT: Okay. That's -- you're Mr. Fisher and  
18 your colleague is Ms. Cooperman?

19 MR. FISHER: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. ZIRINSKY: Good morning, Your Honor. Bruce  
22 Zirinsky and Kevin Finger of Greenberg Traurig for the  
23 noteholders.

24 THE COURT: All right.

25 MR. STEINBERG: Good morning, Your Honor. Arthur

1 Steinberg and Scott Davidson from King & Spalding on behalf  
2 of New General Motors.

3 THE COURT: All right. Folks --

4 MR. DUBLIN: One second, Your Honor. I'm sorry.  
5 Phil Dublin and Sean O'Donnell --

6 THE COURT: Oh, I'm sorry. Mr. Dublin.

7 MR. DUBLIN: Phil Dublin and Sean O'Donnell from  
8 Akin Gump for Green Hunt Wedlake.

9 THE COURT: Okay.

10 MR. O'DONNELL: Good morning, Your Honor.

11 THE COURT: Mr. Dublin, your colleague's name?

12 MR. DUBLIN: Sean O'Donnell.

13 THE COURT: O'Donnell. Okay.

14 All right. Folks, I got the Dickstein Shapiro  
15 reply on the public filing and I want you all preliminarily  
16 to advise me as to the extent to which I, therefore, have  
17 any remaining issues vis-à-vis public filing on the one hand  
18 or a filing in a redacted form on the other, and with a  
19 particular focus on paragraph 44 of the proposed complaint.

20 The main thing I want to then spend time on is on  
21 the disputed documents or the documents where I have  
22 allegations which may or may not be disputed that the  
23 creditors' committee or the -- I guess it's modern name is  
24 the GUC Trust -- relied on those documents in its proposed  
25 complaint.

1 I'll want both sides to address, in particular,  
2 the degree of specificity by which the GUC Trust advised the  
3 defendants' side of its intention to use the documents in  
4 question and to clarify on a document by document basis, if  
5 need be, the extent of any delay or alleged delay between  
6 the time that the defendants' side was notified of the  
7 intent to rely upon them and the time the defendants' side  
8 made its views known.

9 I am going to assume, subject to both sides rights  
10 to be heard, but principally the GUC Trust, that the  
11 inadvertent disclosure of those documents in the first  
12 instance, even if accompanied by some fault, would not by  
13 itself give rise to a waiver, so that the contention is that  
14 if there was a waiver it was not by reason of the delivery  
15 of the documents, but rather a delay or alleged delay in  
16 demanding their return and destruction.

17 With that said, maybe I should hear first from  
18 you, Mr. Fisher. Main lectern, please.

19 MR. FISHER: Good morning, Your Honor.

20 With respect to the first issue which is the  
21 status of the motion to seal, I think that a fair summary of  
22 where we are is that all parties, with the exception of  
23 Aurelius, which I'll deal with in just a moment, consent to  
24 the public filing of the complaint. And my understanding is  
25 that Aurelius' object -- Aurelius' objection to the public



1 filing is not based on any confidentiality concerns, but is  
2 instead based on the production of privilege information  
3 dispute that Your Honor referred to.

4 So under -- under the protective order and with  
5 regard to confidentiality issues I don't think anyone is  
6 objecting at this point to the public filing of the  
7 complaint. And once Your Honor resolves the pending  
8 discovery dispute about the production of privileged  
9 information, I think from there flows the decision as to  
10 whether the complaint can be filed publicly or needs to be  
11 revised or redacted in some way, Your Honor.

12 THE COURT: Uh-huh. Mr. Fisher, would it make  
13 sense if before you continue with the remainder of the  
14 issues you yield to Mr. Zirinsky or whoever it is to brief  
15 me on the Aurelius position and his views as to what I  
16 should do about it?

17 MR. FISHER: I'd be happy to do that, Your Honor.

18 THE COURT: Okay.

19 MR. ZIRINSKY: Your Honor, I'll defer to  
20 Mr. Finger.

21 THE COURT: Okay.

22 MR. FINGER: Good morning, Your Honor. Kevin  
23 Finger, Greenberg Traurig, on behalf of Aurelius Capital  
24 Management and its managed entities.

25 Your Honor, with respect to the -- to the

1 complaint and the GUC Trust motion to file it under seal,  
2 the objection that Aurelius has is that one paragraph,  
3 paragraph 144, appears to -- to quote one of the four  
4 documents that has been clawed back on the grounds of that  
5 it's protected from disclosure on the attorney/client  
6 privilege. It is unclear whether any of the other three  
7 documents are cited. The complaint does not refer to any  
8 specific documents other than -- than publicly filed  
9 documents like SEC filings.

10 So from our reading of the complaint it's just  
11 paragraph 144 that appears to quote one of the documents  
12 that has been clawed back, and that is the basis of the  
13 objection with respect to filing the complaint.

14 THE COURT: Now, Mr. Finger, there is, of course,  
15 the underlying issue. But if your opponent is  
16 inappropriately relying on a document, your opponent is  
17 inappropriately relying on the document to influence me or  
18 some higher court. What difference does it make if the rest  
19 of the world sees that or not since I'm going to see it  
20 anyway?

21 MR. FINGER: It is -- the difference is that it's  
22 a privileged document that is protected from disclosure and  
23 that means protected from -- from everybody from disclosure.  
24 In that sense that's --

25 THE COURT: What is the harm that you are trying

1 to obviate?

2 MR. FINGER: The harm is the disclosure of  
3 privileged communications.

4 THE COURT: Well, putting aside the fact that your  
5 opponent contends that it's not privileged, it's not  
6 privileged at all because it allegedly conveys information  
7 obtained from third parties and your opponents contention  
8 that it is subject to a waiver, would you articulate for me,  
9 if you can, the incremental prejudice to you resulting from  
10 the remainder of the world seeing it?

11 MR. FINGER: It -- it's -- we disagree with  
12 Mr. Fisher's characterization that it's not privileged.

13 THE COURT: I understand that.

14 MR. FINGER: And I could go into that in more  
15 depth at the Court's pleasure.

16 THE COURT: But assume for the sake of answering  
17 my question, which I would like to get the answer to, that  
18 you're right.

19 MR. FINGER: Your Honor, it's the -- it's the  
20 fundamental protections that are provided against the  
21 disclosure of privileged documents. It's an attorney/client  
22 communication that's between -- clearly between lawyers at  
23 Greenberg Traurig and clients at Aurelius, and that client  
24 is entitled to a privilege -- to the privilege and entitled  
25 to protect otherwise responsive documents from disclosure on

1 the grounds of privilege, and that's the prejudice.

2 THE COURT: Mr. Finger, did you understand my last  
3 question when I asked about the incremental prejudice that  
4 results as a consequence of the disclosure to the remainder  
5 of the public?

6 MR. FINGER: I guess I don't understand, Your  
7 Honor, the increment -- what you mean by incremental  
8 prejudice, but I've -- I've tried to articulate the  
9 prejudice to Aurelius and protecting its privilege.

10 THE COURT: Do you have anything further to say?

11 MR. FINGER: Just, Your Honor, that it's -- it's a  
12 mistake that was made by Greenberg Traurig, not by the  
13 client, and the client undertook all -- all diligence to  
14 protect that privilege in terms of meeting ahead of time and  
15 reviewing all the documents not once, but twice. So from  
16 the client's perspective who enjoys that privilege, that  
17 client shouldn't be prejudiced for Greenberg Traurig's error  
18 in this case which led to the inadvertent production.

19 THE COURT: Anything else?

20 MR. FINGER: No, Your Honor.

21 THE COURT: All right. If the document is not  
22 privileged either because it was never privileged or the  
23 portion upon which there was reliance by the GUC Trust is  
24 not privileged, or if there was a waiver, the issue goes  
25 away in any event. If it remains privileged it may well be

1 that the publication of the entire document and of the  
2 entire complaint is nevertheless appropriate, but I'll defer  
3 decision on that until I've heard the remainder of the  
4 arguments on the privileged nature of what is at least  
5 seemingly the single document referred to in paragraph 44  
6 and the others in question.

7 Mr. Fisher, come on up again, please, and address  
8 that with particular reference to the questions that I asked  
9 at the outset.

10 MR. FISHER: Your Honor, first, one thing I wanted  
11 to make clear is that when we prepared the complaint and  
12 when we submitted the complaint to Your Honor in connection  
13 with our motion to file the complaint under seal all of that  
14 was done before any documents were clawed back, so I don't  
15 think anyone is claiming that it was improper for us to  
16 consult these documents in preparing the complaint. We  
17 hadn't even received a claw back request yet at that point  
18 in time.

19 And to speak directly to Your Honor's questions  
20 about waiver and the privilege that attaches to these  
21 particular four documents, I think the chronology which I  
22 can sketch out very briefly is critical to our waiver  
23 position.

24 In essence, we sent the first version of our  
25 complaint to all parties who had produced confidential

1 information on December 19th, and we said, here's the  
2 complaint that we plan to file. We'd like your consent to  
3 file it publicly consistent with the protective order. And  
4 the response to --

5 THE COURT: Pause, please, Mr. Fisher. At that  
6 time did the draft complaint, paragraph 44, have the same or  
7 different content than it has now?

8 MR. FISHER: So, Your Honor, it's paragraph 144.

9 THE COURT: Oh, 144. Excuse me.

10 MR. FISHER: And in substance I think in the same  
11 words that allegation was in that first version of the  
12 complaint. It was in a different paragraph number, but the  
13 allegation was there and the quoted language from the  
14 document at issue was also in that initial complaint.

15 THE COURT: Continue.

16 MR. FISHER: The response that we got back the  
17 next day was, that's not good enough. You can't just give  
18 us the complaint and ask us to consent to public filing.  
19 We'd like to know every document that was confidential that  
20 you relied on in preparing this complaint. We didn't think  
21 we were required to, but to move things along we provided  
22 the -- all the parties, including the noteholders -- with a  
23 complete list of every document that we relied on in  
24 preparing the complaint.

25 THE COURT: In what form? By numeric reference

1 like Bates numbers alone or a combination of Bates number  
2 plus a substantive description of the document associated  
3 with the Bates number?

4 MR. FISHER: It was just --

5 THE COURT: And by way of example, one of the  
6 bones of contention between your constituency and JP Morgan  
7 Chase in the underlying term litigation is that describing a  
8 document by number as contrasted by a textual description  
9 is, at least in the view of some, not as helpful.

10 MR. FISHER: Your Honor, we provided a list of  
11 Bates numbers. There was no substantive description and  
12 that's because we responded the next day with our list and  
13 we didn't -- we didn't want to waste any time.

14 In response to -- in connection with providing  
15 that list of documents we asked all parties to please review  
16 it and, if possible, let us know by the end of the week  
17 whether they consented to the public filing of the  
18 complaint. The response that we received was, that's not  
19 enough time. The holidays are upon us. We're going to need  
20 a lot more time to carefully review this, and in fact there  
21 was an email that we attached to our letter to Your Honor in  
22 which Greenberg Traurig said, you're asking us to waive  
23 confidentiality under the protective order. We need an  
24 opportunity to -- to look at each and every document  
25 carefully, and there was a letter from Mr. Zirinsky to -- to

1 a similar effect.

2 THE COURT: Is the confidentiality that was the  
3 subject of that discussion confidentiality in the commercial  
4 sense by which people in case after case after case before  
5 me produce documents under confidentiality stipulations and they  
6 say that they want everything under seal, or are we talking  
7 in the context of confidentiality within the meaning of the  
8 attorney/client privilege or both?

9 MR. FISHER: I think in -- in context that initial  
10 communication from Greenberg Traurig was talking about  
11 confidentiality in the commercial sense. In other words,  
12 what Greenberg was saying was, before we can allow you to  
13 make public allegations that are based on these documents  
14 that we've designated as confidential in the commercial  
15 sense we need to review them carefully. And they -- they  
16 told us that they needed at least until January 5th to get  
17 that done. So we said, okay. We can wait until  
18 January 5th.

19 On January 5th we received a letter from Greenberg  
20 Traurig on behalf of all the noteholders whose confidential  
21 information was implicated by the complaint saying, you  
22 know, subject to all of our rights to move to dismiss and --  
23 and, you know, even though we think your complaint is  
24 baseless we consent to the public filing of the complaint.

25 So Greenberg was not the issue at the time. In



1 fact, it was concerns that -- that -- that new GM and that  
2 the GM Nova Scotia finance trustee had about confidentiality  
3 that required us to file the motion -- the motion to file  
4 under seal. It wasn't Greenberg concerns. As of  
5 January 5th they had authorized us to file the complaint  
6 publicly.

7 THE COURT: Now at -- as of January 5th to what  
8 extent was Aurelius carved out from the consent granted on  
9 the remainder?

10 MR. FISHER: As of January 5th the letter from  
11 Greenberg Traurig was on behalf of all noteholders  
12 authorizing us to publicly file the complaint that was based  
13 on documents that we had specifically identified to them and  
14 that they had told us that they had reviewed and had  
15 concluded they had no objection to the public filing of the  
16 complaint.

17 THE COURT: Continue, please.

18 MR. FISHER: On January 17th we submitted the  
19 complaint to the Court in connection with our motion to have  
20 the complaint filed under seal, and then on January 19th,  
21 two days later, for the first time we received a claw back  
22 request from Aurelius, and on January 24th we received a  
23 follow up claw back request. In total those two letters  
24 requested the return of 115 documents that they said had  
25 been inadvertently produced and that were privileged.

1           It took us approximately a week to comply with the  
2       protective order and destroy all of the documents that they  
3       said were privileged, but we reserved all of our rights, and  
4       we're not here today to argue about the 115 documents.  
5       We're -- that's done. They clawed them back under the  
6       protective order and we destroy -- and we destroyed them.

7           What we're arguing about only are four out of  
8       those 115 documents, and the reason why we think that those  
9       documents are exceptional are specifically because of the  
10      chronology that I just laid out, namely these specific  
11      documents. And in terms of Aurelius documents, Your Honor,  
12      there were ten documents in total produced by Aurelius that  
13      we identified as Aurelius documents that we relied on in  
14      preparing the complaint.

15           So Aurelius had ten documents to look at and told  
16      us, you can go ahead and publicly file the complaint and  
17      didn't say anything about privilege until after we had  
18      prepared two versions of the complaint, because by the time  
19      we submitted the complaint to Your Honor it had been  
20      revised, and -- and filed a motion to have that complaint  
21      filed under -- under seal.

22           So that's why we think those four documents stand  
23      out in terms -- and -- and those are the only documents as  
24      to which we're making a waiver argument.

25           So it's -- to come to a question that Your Honor

1 asked at the outset, it's not simply an inadvertent  
2 production situation. This is a situation where we received  
3 authorization to publicly file a complaint after these  
4 specific documents were called to Aurelius' counsel's  
5 attention and the claw back privilege request came only  
6 later.

7 THE COURT: And you're relying, in substance, on  
8 the passage of time between December 19th, 2011 and  
9 January 19th, 2012?

10 MR. FISHER: The documents were first produced --  
11 first produced by Aurelius September 30th, 2011. But it's  
12 not even just the passage of time, Your Honor, it's -- it's  
13 -- it's the uniqueness of a situation where your adversary  
14 tells you, I've looked at these documents you can go ahead  
15 and file the complaint. And -- and -- and then only  
16 later --

17 THE COURT: That -- that being --

18 MR. FISHER: -- insists a claw back --

19 THE COURT: -- roughly the period between  
20 January 5 and January 17?

21 MR. FISHER: Well, the documents were first  
22 identified to them on December 20, so we would say from  
23 December 20 until January 19 or maybe it was January 24 when  
24 the claw back concerning these particular documents came.  
25 I'm not -- I'm not certain whether it was the 19th or the

1 24th with regard to these -- these four.

2 THE COURT: Uh-huh.

3 MR. FISHER: In terms of arguments as to whether  
4 these four documents are privileged or not, as is often the  
5 case in these disputes, we're somewhat hamstrung because  
6 we've destroyed the documents, but what we do have left is  
7 the allegation in paragraph 144, and so there we can make an  
8 argument, I think compellingly, as to why the document that  
9 we relied on, and the document that's really the irritant  
10 here causing the dispute is not privileged. And that's  
11 because the document in question is an email wherein a non-  
12 lawyer at Aurelius conveyed to another non-lawyer at  
13 Aurelius the substance of a conversation that that first  
14 non-lawyer --

15 MR. FINGER: Excuse me, Your Honor. I have to  
16 object because I fear that Mr. Fisher's description is  
17 conveying the substance of the email and --

18 THE COURT: Well, Mr. -- I get the point, but as  
19 you well know, Mr. Finger, the subject matter of an  
20 allegedly privileged communication is not privileged. Only  
21 the substance of it is.

22 Mr. Fisher, I assume you're aware of that  
23 distinction as well --

24 MR. FISHER: Yes, Your Honor.

25 THE COURT: -- and you're not going to let the cat

1 out of the bag in making your point.

2 MR. FISHER: I will be careful.

3 THE COURT: Okay.

4 MR. FINGER: Thank you, Your Honor.

5 MR. FISHER: So the first non-lawyer at Aurelius  
6 was conveying the substance of a conversation that that non-  
7 lawyer had with counsel to new GM. There's no -- there's no  
8 claim of privilege between that non-lawyer -- Aurelius non-  
9 lawyer's conversation vis-à-vis new GM. When the non-lawyer  
10 at Aurelius passed that information along to the other non-  
11 lawyer at Aurelius he copied two -- two lawyers from  
12 Greenberg Traurig, and I think that that's what gives rise  
13 to the claim of privilege, and our argument is simply that  
14 when a non-lawyer passes along a non-privileged conversation  
15 and it's clear from the face of the document, as we recall  
16 it, that the primary objective of -- of this communication  
17 was not to secure legal advice, but to convey the substance  
18 of a non-privileged conversation.

19 We don't think that a claim of privilege  
20 appropriately attaches to that document, Your Honor.

21 THE COURT: Uh-huh. Okay.

22 Mr. Finger.

23 MR. FINGER: Thank you, Your Honor.

24 The -- this was an inadvertent production caused  
25 by an error by Greenberg Traurig after substantial meetings

1 with client representative and lawyers, and I can go into  
2 further describe the inadvertence if the -- if the Court is  
3 interested in that, but it's --

4 THE COURT: Well, pause, please, Mr. Finger.  
5 You're ahead on that issue because I said that I wasn't of a  
6 mind, subject to Mr. Fisher's ability to be heard, to say  
7 that the production in the first instance amounted to the  
8 waiver. Do you still want to address that?

9 MR. FINGER: No, Your Honor. I was going to say  
10 I was going to transition to the -- to the December 19th  
11 through January 19th time period if that's acceptable to the  
12 Court.

13 THE COURT: Yes, please.

14 MR. FINGER: The -- counsel did provide a draft  
15 complaint on January 19th in pursuant to request a --

16 THE COURT: You said January 19th.

17 MR. FINGER: I'm sorry.

18 THE COURT: Did you mean December 19th?

19 MR. FINGER: I did, Your Honor, I misspoke. On  
20 December 19th. On December 20th provided a list of Bates  
21 numbers of the 192 Bates ranges, but many of those ranges  
22 contained multiple documents, and it's --

23 THE COURT: I couldn't hear you on that last  
24 point.

25 MR. FINGER: I'm sorry. It's 192 separate Bates

1 ranges, but within certain of the Bates ranges were multiple  
2 documents and that amounted to a stack of paper several  
3 inches high.

4 On -- now as part of that draft complaint there  
5 were three defendants named that were once holders of the  
6 Nova Scotia notes, but at that point in time and still today  
7 do not hold those notes. And on December 21st Greenberg  
8 Traurig sent a letter to Mr. Fisher on behalf of three of  
9 those clients, Aurelius, Capital Management, Appaloosa and  
10 Perry informing them that they were not holders of notes or  
11 holders of claims and were not proper defendants in that  
12 complaint. And that was the response on behalf of those  
13 three noteholders.

14 On behalf of the other three clients of Greenberg  
15 Traurig that -- that currently held notes and continue to  
16 hold notes, we sent a separate response that informed  
17 Dickstein Shapiro that we would need additional time in  
18 order to consider the issue of confidentiality.

19 On January -- on January 5th, Mr. Davidson, on  
20 behalf of new General Motors, sent an email to Ms. Cooperman  
21 and asked about the status of the complaint. Ms. Cooperman  
22 responded and said, we have revised the complaint, but we  
23 will not show it to you. So we still want to know whether  
24 you'll consent to publicly filing it. And with that  
25 response we sent a very short response that said, subject to

1 all of our rights and remedies, including the right to  
2 change our mind about whether it should be publicly filed  
3 when we actually see the document, we -- we are not going to  
4 stand on the terms of the protective order in terms of  
5 compelling the complaint to be filed under seal.

6 We -- we had discussions with our clients about  
7 other concerns that may have over -- overridden the  
8 confidentiality issues as protected by the protected (sic)  
9 order, but that's what we informed them.

10 That letter was not on behalf of Aurelius,  
11 Appaloosa or Perry, it was -- it was on behalf of the other  
12 ones, although I will say that the letter itself does not  
13 say that specifically.

14 THE COURT: Which letter are we talking about  
15 doesn't say that specifically?

16 MR. FINGER: The January 5th letter whereby we  
17 informed Mr. Fisher that we were not going to invoke our  
18 rights under the protective order to cause the revise  
19 complaint that we hadn't seen to file it under seal.

20 On January 17th Mr. Fisher informed us, the  
21 noteholders, new GM, et cetera, that it intended to file a  
22 motion to file under seal, and later that afternoon or the  
23 evening it sent a copy of the revised draft complaint, which  
24 is the first time we had seen it on January 17th.

25 On January 19th is when Aurelius sent the letter



1 clawing back a certain number of documents, caused Greenberg  
2 Traurig to review not only the Aurelius production, but  
3 every production on behalf of its noteholder clients to see  
4 whether the error that caused the inadvertent production in  
5 September had been extended to other client productions.

6 On January 24th we sent a letter with a complete  
7 list of claw back documents, and that's the sequence of  
8 events, Your Honor. The -- but that sequence, really, is  
9 -- is not govern here because the agreed protective order  
10 that's entered by the Court is what governs. In paragraph 3  
11 of that protective order says specifically that the  
12 inadvertent production of documents otherwise protected from  
13 disclosure does not serve as a waiver of the privilege.  
14 That -- that -- and the cases --

15 THE COURT: All right. Pause, please.

16 MR. FINGER: Yes.

17 THE COURT: Are you contending that that would  
18 provide absolution for all time or would you still be  
19 subject to what is, in substance, a latches contention?

20 MR. FINGER: Well, Your Honor, I -- the terms of  
21 the protective order and the cases that interpret similar  
22 provisions of protective orders indicates, or at least  
23 suggests that it -- I wouldn't say for all time, that seems  
24 extreme -- but that there is no timeliness requirement built  
25 in. That's what the rules and the case law would otherwise

1 impose in the absence of a protective order. And what the  
2 cases say that interpret the protective order that have been  
3 ordered -- that's the Zevally (ph) case, the HDB -- HDB  
4 Nordberg (ph) case, and others suggest that that timeliness  
5 requirement has been negotiated away and that in a similar  
6 provision the inadvertent production of privileged documents  
7 does not serve as a waiver and then it provides a procedure  
8 for that.

9 And the remedy that's also provided in that  
10 paragraph 3 is if the receiving party wants to challenge the  
11 designation of privilege they may do so by motion, but that  
12 -- that's how the protective order handles the situation and  
13 that protective order governs this case, and the cases  
14 interpreting it from the Southern District of New York state  
15 clearly that the protective order trumps the case law and  
16 even Federal Rule of Evidence 502.

17 So in this case the -- there is no timeliness  
18 requirement. But even if there was a timeliness  
19 requirement, Your Honor, that's been met here in the sense  
20 that it -- that timeliness runs from not from what I'll call  
21 a document dump of saying, here's a long list of Bates  
22 numbers, go figure out whether any of them are referenced in  
23 this complaint.

24 We discovered on or about January 17th when we got  
25 the revised complaint that one of these documents is being

1 cited in the complaint and is actually -- has been submitted  
2 to the Court, and within two days submitted a claw back of  
3 those and other documents, and then within five days after a  
4 complete review of all document productions issued the claw  
5 back letter of all the documents.

6 So even if this Court applied a timeliness  
7 requirement it runs from the date of discovery in this case,  
8 so it's a matter of a few days in terms of when it was  
9 discovered by counsel and when it was clawed back.

10 Then, even if one was going to apply timeliness  
11 requirement it -- the cases suggest that there -- it would  
12 value the prejudice. And in this case there is no  
13 prejudice to -- to the trust. They -- they shouldn't have  
14 access to a privileged document, and the fact that they do  
15 has been undone by the protective order.

16 So in -- in -- to this point, Your Honor, there is  
17 an obligation under the New York ethical rules for a lawyer  
18 who is in receipt of a document that appears to be  
19 privileged for that lawyer to contact the producing party.

20 The documents we're talking about are emails  
21 between client representatives and Greenberg Traurig, and --

22 THE COURT: Well, Mr. Fisher makes a slightly  
23 different contention. He says they're emails between two  
24 non-lawyers and Greenberg Traurig personnel were cc'd. Is  
25 there a factual dispute on his contention?

1 MR. FINGER: Let me verify that, Your Honor. That  
2 is -- that is technically true. It's an email exchange that  
3 numbers nine pages when it's printed out, and it begins with  
4 an email exchange between lawyers at Weil Gotshal and  
5 lawyers at Greenberg Traurig. And then at some point  
6 lawyers at Greenberg Traurig --

7 THE COURT: Okay. Weil Gotshal is the other  
8 side --

9 MR. FINGER: Yes.

10 THE COURT: -- from you?

11 MR. FINGER: So that's not privileged. There's a  
12 -- there's a -- this is why the document was redacted rather  
13 than -- than fully withheld on the grounds of privilege.

14 Through this email --

15 THE COURT: Continue.

16 MR. FINGER: Through this email string Greenberg  
17 Traurig lawyers forwarded to client representatives, which  
18 produced a series of back and forth emails between lawyers  
19 and clients. I believe there are eight such email exchanges  
20 back and forth discussing how to respond to what the Weil  
21 Gotshal lawyer had -- had informed Greenberg Traurig.

22 The very top of that email is an email from a  
23 client representative to another client representative, but  
24 copying two lawyers at Greenberg Traurig. And so I don't  
25 know if that's technically a factual dispute, but it's still

1 an email exchange, several of them, that's private and  
2 confidential between client representatives and lawyers at  
3 Greenberg Traurig.

4 Interestingly, the case that Mr. Fisher cites in  
5 -- in his response about -- for the -- the only case that's  
6 cited to suggest that this document is not privileged, and  
7 what -- what he cites it for is the proposition that merely  
8 conveying the substance of what a third party has conveyed  
9 is not privileged. That's what Mr. fisher cites it for.

10 Later in that opinion -- it's the Union Box  
11 Office --

12 THE COURT: You're talking about Ted Katz'  
13 decision -- Magistrate Judge Katz' decision?

14 MR. FINGER: Yes, Your Honor. It's Urban Box  
15 Office Network is the name of the case.

16 THE COURT: Yes. And -- and presumably you're  
17 referring to page 2 of that decision?

18 MR. FINGER: Well, I'm referring to the specific  
19 quote, Your Honor, when information --

20 THE COURT: "For example, where the attorney or  
21 client is merely conveying the substance of what a third  
22 party has conveyed the communication is not privileged."  
23 That's what Mr. Fisher is relying upon.

24 MR. FINGER: That's correct, Your Honor.

25 THE COURT: And I was reading from Judge Katz'

1 decision.

2 Okay. Now are you saying that you disagree with  
3 Judge Katz' view of the law on that or are you saying that  
4 there's something else that Judge Katz helps you more than  
5 that?

6 MR. FINGER: Later in the opinion Judge Katz goes  
7 on to say -- and if the Court wants -- it's at 250 -- I  
8 don't have the pin cite to it. I can get the pin cite if  
9 you'd like me to, Your Honor. But Judge Katz goes on to  
10 say:

11 "When information is conveyed to an attorney, the  
12 communication need not specifically ask for legal  
13 advice in order to maintain the documents  
14 privileged status so long as the information is  
15 sent to counsel in order for counsel to provide  
16 legal advice."

17 That opinion cites the Buspirone Anti-trust  
18 litigation and goes on to cite the Pfizer Securities  
19 litigation and quotes it and says:

20 "An implied request for legal advice exists when  
21 an employee sends information to corporate counsel  
22 in order to keep them apprised of ongoing business  
23 developments with the expectation that the  
24 attorney will respond in the event the matter  
25 raises important legal issues."

1 That's exactly the situation that's here. There  
2 may have been discussion with third party, but sharing that  
3 with counsel as part of an ongoing string where legal advice  
4 is -- is sought and conveyed continues that privileged  
5 dialogue between lawyers and clients, and that's what --  
6 what the case is in this particular email.

7 So the fact that there was a discussion with a  
8 third party does not end the inquiry. The inquiry extends  
9 to suggest that the discussion -- the fact that the  
10 information is shared expects -- is -- is, to quote Judge  
11 Kat, "an implied request for legal advice," and that's what  
12 happened in this case and, therefore, the document is, in  
13 fact, privileged.

14 THE COURT: You're saying that when a non-  
15 privileged communication is shared with the attorney a  
16 privilege attaches to the non-privileged communication?

17 MR. FINGER: No, Your Honor. I'm saying that an  
18 -- an attorney/client communicate -- for the privilege to --  
19 to apply there has to be the communication between a lawyer  
20 and a client for the purpose of seeking or obtaining legal  
21 advice. And that definition is met here and Judge Katz  
22 acknowledged it when, in this case, information is being  
23 conveyed to the lawyer with the expectation that it's a --  
24 it's an implied request for legal advice and with the  
25 expectation that legal advice will be returned based on the

1 information that's provided.

2 THE COURT: Now was the source of the  
3 communication that was conveyed to the attorney with  
4 somebody at new GM?

5 MR. FINGER: Yes. And --

6 THE COURT: And is it agreed that if Mr. Fisher  
7 were to depose the guy at new GM who spoke to your Aurelius  
8 guy he could ask away with regard to that?

9 MR. FINGER: Yes. He can ask Mr. Benomo (ph) what  
10 he said to -- to somebody else that -- that's not a  
11 privilege. He's -- he's a lawyer, but this would not be a  
12 privileged communication. He's free to ask that question,  
13 but he's not free to use a document that's protected from  
14 disclosure on the grounds of -- of the attorney/client  
15 communication privilege.

16 THE COURT: Uh-huh.

17 MR. FINGER: And that's --

18 THE COURT: Anything else before I give Mr. Fisher  
19 a chance to respond?

20 MR. FINGER: No, Your Honor.

21 THE COURT: Very well.

22 Mr. Fisher, do you wish to reply?

23 MR. FISHER: Very briefly, Your Honor.

24 THE COURT: Go ahead.

25 MR. FISHER: First, just to address the standard



1 that Your Honor should apply here, I -- it -- I agree to a  
2 certain extent that the timeliness of the request is not the  
3 same. That issue, the timeliness of the claw back is not  
4 the same as it would be in the absence of a protective  
5 order.

6 My understanding of the case law is that where  
7 there is a -- where there is no protective order or at least  
8 a protective order that doesn't have a claw back provision  
9 like ours, then the Court applies a reasonableness test and  
10 looks at a number of different factors, including any delay  
11 in seeking the claw back.

12 Where there is a protective order like ours then  
13 the standard is recklessness. But -- and we -- we -- we  
14 submit that when you tell Aurelius here are ten documents  
15 we're relying on in our complaint, please review them and  
16 tell us whether we can publicly file our complaint, they  
17 review them and say, go ahead and publicly file the  
18 complaint, that that rises to the level of recklessness.

19 But even separate and apart from that, we're not  
20 arguing here that it's the inadvertent disclosure that  
21 caused the waiver. We're arguing that that communication is  
22 tantamount to a knowing waiver because counsel are telling  
23 us we've looked at these documents and you can go ahead and  
24 do what you're doing with them.

25 With regard to Mr. Finger's point about on whose

1       behalf the January 5th, 2012 letter was written all I can  
2       say is that we received the letter from Greenberg Traurig.  
3       We know who Greenberg Traurig represents. We had been going  
4       back and forth with them with all kinds of arguments about  
5       whether Aurelius should or should not be named as a  
6       defendant in the -- in the complaint. And what they told us  
7       was that our clients will not require that the draft  
8       complaint be filed under seal.

9               So I would say that the onus is on Greenberg  
10       Traurig to tell us on whose behalf they're communicating if  
11       they're only communicating supposedly on behalf of a subset  
12       of their clients. I don't think it's fair to construe that  
13       letter as a letter that was not written on Aurelius' behalf.

14              And, finally, Your Honor, with regard to the  
15       underlying question of whether this particular document is  
16       privileged, I should say that our objective here, really,  
17       was having prepared the complaint, having gone through a  
18       revision of the complaint after receiving a lot of angry  
19       letters, and then having submitted it to the Court, we  
20       didn't want to have to revise the complaint and then go  
21       through that solicitation process again, and then if someone  
22       objected file a new motion to have the complaint filed under  
23       seal. We were trying to move things along here.

24              And for all the reasons I've already mentioned we  
25       think there's been a knowing waiver here. If there hasn't

1       been we think that at least as to these four documents the  
2       behavior was reckless.

3               And -- and, finally, if Your Honor doesn't find a  
4       waiver on one of those two grounds, then Your Honor needs to  
5       reach the privilege issue. Your Honor can probably best  
6       reach it by reviewing the document in question, which Your  
7       Honor doesn't have the benefit of and I don't have the  
8       benefit of having the document in front of me.

9               When Mr. Finger stood here with the document,  
10       we're not contending that the privileged portions of the  
11       communication should be produced to us. Of course not.  
12       They were originally produced to us in redacted form where  
13       paragraph 144 just relies on the first page of that email  
14       which is the non-privileged communication that -- that I've  
15       described to the Court.

16               THE COURT: All right. Everybody sit in place for  
17       a minute.

18               (Pause)

19               THE COURT: Before I rule, Mr. Fisher -- never  
20       mind.

21               All right. Gentlemen, Ms. Cooperman, I am ruling  
22       that the protective order does not provide absolution for  
23       all time for delays in asserting rights that would otherwise  
24       apply under the protective order and that undue delay or  
25       latches could still, under certain circumstances, result in

1 a waiver.

2 But I'm further ruling that under the facts here,  
3 given the chronology, with or without the specific carve-out  
4 on behalf of Aurelius, that the Greenberg Traurig firm, on  
5 behalf of its client, sufficiently acted promptly so that I  
6 do not have a situation at the outer end where contentions  
7 as to latches or waiver by undue delay would consequently  
8 attach.

9 Therefore, the production of the documents will  
10 rise or fall with respect to their underlying nature as  
11 documents as to which the privilege properly could be  
12 invoked.

13 Putting it another way, if and to the extent that  
14 they're privileged you can't use them, and you would have to  
15 drop the statement in 144 that relied upon them, and  
16 conversely to the extent that they're not privileged you can  
17 use them as you see fit. This, of course, would, in  
18 addition, be without prejudice to your rights to depose  
19 parties on either side of a non-privileged communication to  
20 find out what either said to the other.

21 A separate issue, which was articulated in your  
22 letter and which exists under Judge Katz' statement of the  
23 law in Urban Box Office Network, 2006 WestLaw 1004472, with  
24 which neither side appears to disagree, is whether the  
25 privilege was properly invoked in the first place with any

1 -- with respect to any one of the four documents in  
2 question.

3 Mr. Finger, you or Mr. Zirinsky or some person  
4 acting on your behalf is to get me those four documents at  
5 your earliest reasonable convenience for in camera review.  
6 You are to also provide me, if you wish, and Mr. Fisher or  
7 his designee is to provide me, if he wishes, any cases --  
8 and I want, as a favor to me, copies of the cases, not just  
9 giving me cites -- of any cases that either side believes I  
10 should take into account on the legal principles associated  
11 with the communication between attorney and client with  
12 respect to communications by a third party.

13 And if the law is different -- and I express no  
14 view on it now -- I'm pretty good on this law except with  
15 respect to cases that have come up in the last couple of  
16 years, but I want to be sure that I've gotten it right --  
17 with respect to whether it makes a difference as to whether  
18 the lawyer is the principle addressee or is being copied,  
19 and to the extent there is a rule of law as stated by  
20 Mr. Finger with respect to either conveying information from  
21 the third party as part of a continuing representation by  
22 the lawyer or more broadly providing the substance of the  
23 non-privileged communication to the lawyer sanitizes an  
24 otherwise non-privileged communication and makes it subject  
25 to non-disclosure.

1           Those are areas in which I would specifically want  
2           your assistance, but that's without prejudice to your rights  
3           to give me anything else that you think is relevant.

4           I well understand, Mr. Fisher, that you no longer  
5           have the document and you, are in a sense, are fighting with  
6           Mr. Finger with a hand tied behind your back, but that's the  
7           way it is. You can't do anything about that. I'm not going  
8           to require Mr. Finger to give you the document again to help  
9           you fight the fight with him.

10           Cases going back thirty years to a case which, if  
11           I recall its name correctly, is J.P. Foley and Company  
12           versus Vanderbilt, discuss the proposition that otherwise  
13           privileged communications do not become -- let me rephrase  
14           that -- otherwise unprivileged communications do not become  
15           privileged because non-privileged information is  
16           communicated by attorney to client or client to attorney,  
17           but the issue may or may not be the same when it's part of a  
18           continuing legal representation. And I'll give you guys,  
19           both sides, the opportunity to brief me on that.

20           I also would not for half a second suggest that  
21           you exclude decisions by MJ's. The magistrate judges in  
22           this district and elsewhere are some of the most expert on  
23           these areas and I very much care what they have to say.

24           All right. Pending my consideration of the  
25           underlying privilege issues on those four documents,

1 Mr. Fisher, you are authorized to file the complaint in the  
2 clear, but with the contested paragraph 144 redacted. And  
3 after I rule I will then decide whether or not we'll  
4 declassify the redacted portion of that document.

5 Okay. Not by way of re-argument, do we have any  
6 further business here?

7 MR. FISHER: Yes, Your Honor. Just the status  
8 conference component of today's hearing on Nova Scotia,  
9 which I believe we've achieved a fairly broad consensus on  
10 scheduling issues and I just wanted to briefly apprise the  
11 Court of that.

12 THE COURT: Certainly. But I want you to come to  
13 the main lectern so I can hear you better, and then if  
14 Mr. Finger or Mr. Zirinsky wants to be heard after that, I'm  
15 going to make a similar request.

16 MR. FISHER: Your Honor, the parties have agreed  
17 on cut-offs for the conclusion of fact depositions and also  
18 on cut-offs for expert discovery. And we -- if Your Honor  
19 wishes we can simply reflect those dates in a stipulation to  
20 be submitted to the -- to the Court.

21 We also envision an evidentiary hearing, which is  
22 something that we mentioned to the Court at the last status  
23 conference, and we spoke to Your Honor's deputy this morning  
24 about potential dates. And it appears that there are dates  
25 available during the week of August 6th. Ms. Blum was able

1 to --

2 THE COURT: There are indeed dates available on  
3 August 6th, but I was less clear on how many days you guys  
4 needed the aggregate.

5 MR. FISHER: I -- I think, Your Honor, it's of  
6 course hard to know, but we project perhaps seven or eight  
7 days, although I think we'll all try to be as efficient as  
8 possible and we appreciate that we may not be able to get  
9 all of those days consecutively on Your Honor's calendar.

10 So I think our approach was to sort of take as  
11 much as we -- we -- we reasonably could given Your Honor's  
12 calendar and -- and then try our best to -- to fit the  
13 hearing into whatever time Your Honor had, and then to find  
14 supplemental dates as necessary.

15 So Ms. Blum was able to identify approximately  
16 five dates and said during that week -- she -- she wasn't  
17 certain whether Your Honor would want to have hearing days  
18 on the Monday, August 6th or on the Friday, August 10th. If  
19 Your Honor is open to hearing -- to having this matter heard  
20 on those dates then there are five consecutive days that --  
21 that week, Your Honor.

22 THE COURT: Uh-huh. Well, of course, the  
23 practical problem is that as important as -- as some people  
24 like to think that the GM case is, it's not the only case on  
25 my docket, including others that have some very major



1 controversies and others who believe that, you know, you  
2 don't have to be a mega-case to be entitled to court time.

3 I assume that the estimate of trial time that you  
4 have is still on the assumption that direct will go in by  
5 affidavit or declaration?

6 MR. FISHER: Yes.

7 THE COURT: Uh-huh. All right. Let me hear from  
8 Mr. Finger or Mr. Zirinsky.

9 MR. ZIRINSKY: Thank you, Your Honor.

10 I -- I do think and I want to thank Mr. Fisher and  
11 the other -- and counsel for the other parties in this  
12 litigation that I do think we've made substantial progress  
13 in terms of defining the road map to be able to present this  
14 controversy to Your Honor.

15 We believe that in addition to having agreed to  
16 firm deadlines for completion of fact depositions and expert  
17 depositions, we -- we believe we've also agreed on some  
18 maximum numbers of depositions as well, which are  
19 significant, but we've attempted -- we thought they needed  
20 less, if any. They thought they needed a lot more, but  
21 we've actually reached an agreement, you know, subject to  
22 some startling development where parties could come back to  
23 see Your Honor if they needed relief.

24 But we -- we do think it's a significant  
25 accomplishment. We've agreed to basically sixteen fact

1 depositions by --

2 THE COURT: Did you say 1-6?

3 MR. ZIRINSKY: 1-6. The original ask was over  
4 forty. So we're down to 1-6 which we think is a major feet.

5 We have not finalized our view, but we think we --  
6 from -- from our perspective we think no more than three  
7 that we would be taking for a total of nineteen, and other  
8 parties have reserved rights. They may wish to try to  
9 designate some additional parties for deposition.

10 THE COURT: Pause, please, Mr. Zirinsky. What  
11 parties are there besides you and -- or your clients and the  
12 GUC Trust, and to a lesser extent, new GM?

13 MR. ZIRINSKY: We also have the Canadian  
14 trustee --

15 THE COURT: Oh, of course.

16 MR. ZIRINSKY: -- Nova Scotia trustee.

17 THE COURT: Green Hunt Wedlake.

18 MR. ZIRINSKY: Green Hunt Wedlake, which is --

19 THE COURT: Oh, yes.

20 MR. ZIRINSKY: -- they -- they are the holder --  
21 the trustee is the holder of the wind up claim --

22 THE COURT: Uh-huh.

23 MR. ZIRINSKY: -- under Canadian law, which is  
24 disputed, obviously, by the GUC Trust.

25 THE COURT: Mr. Dublin's client.

1 MR. ZIRINSKY: Yes. That's correct. So those are  
2 the parties.

3 THE COURT: Okay.

4 MR. ZIRINSKY: We did all meet and confer  
5 yesterday and I think we have a -- you know, roughly we have  
6 a -- a global agreement, and I think Mr. Fisher's suggestion  
7 that the parties endeavor to reduce this to a written  
8 stipulation to be submitted to Your Honor is a good idea.

9 We think the deadlines are realistic, the target  
10 deadlines are realistic. We also think that we should be  
11 able to accomplish an evidentiary hearing in five to eight  
12 days. I'm more optimistic, perhaps, than Mr. Fisher, but I  
13 do think that if Your Honor is able to carve-out time in --  
14 in August that would be very helpful. We would all endeavor  
15 to try to complete within whatever time Your Honor was able  
16 to allocate to us.

17 I just want to make one -- one other comment, and  
18 that is I know Your Honor's views on dispositive motions and  
19 we had had conversations about that in the past. I just  
20 want to make it clear, and I don't think there's any  
21 disagreement on this, that we obviously are not agreeing to  
22 waive any rights or defenses or objections or -- or  
23 otherwise by agreeing to go forward on this basis without an  
24 evidentiary hearing. We assume that the schedule will allow  
25 sufficient time for pretrial briefs to be submitted to Your

1 Honor in advance of an evidentiary hearing.

2 And we might suggest that at the outset of the  
3 evidentiary hearing, or an earlier date if Your Honor wants  
4 to set that, that Your Honor might hear some argument as to  
5 try -- so that we could try to at least eliminate some of  
6 the issues that we think Your Honor may be able to dispose  
7 of without evidentiary hearing and try to narrow the focus  
8 of what actually has to get heard before Your Honor through  
9 -- through testimony.

10 THE COURT: Do you think there would be material  
11 incremental benefits as a result of doing so?

12 MR. ZIRINSKY: I believe so, yes. I believe a  
13 number of the claims can be dealt with as a matter of law.

14 THE COURT: Uh-huh. All right.

15 MR. ZIRINSKY: Thank you.

16 Mr. Steinberg, do you want to weigh in on this?

17 MR. STEINBERG: Yes.

18 Your Honor, we did file a statement in connection  
19 with the ceiling motion. There was an element that was sort  
20 of a technical situation where we wanted to close the loop,  
21 which is that we had formally been a party to the contested  
22 matter and now that they're bringing the adversary  
23 proceeding, which was done for -- to try to address the  
24 procedural objection, we wanted to be able to participate in  
25 the adversary proceeding aspect of this dispute.

1 All of the parties have agreed that we should be  
2 able to do that, but we would like to be able to submit an  
3 order similar to what we had done in the contested matter as  
4 a right to be heard and -- and -- in this matter.

5 THE COURT: Well, you've got that right under term  
6 loan lenders Caldor (ph), right?

7 MR. STEINBERG: I certainly have the right to be  
8 heard, but this is an adversary proceeding --

9 THE COURT: A right to intervene.

10 MR. STEINBERG: Right. I -- that's correct.

11 THE COURT: And under my ruling in Adelphia (ph)  
12 you have that right to intervene, but the extent to which  
13 you would participate would depend on the circumstances as  
14 to the level of your participation and what you want to do,  
15 and it wouldn't equate to ownership of the cause of action  
16 except insofar as you otherwise have one under law. You  
17 understand all of that?

18 MR. STEINBERG: That -- that's true, Your Honor.  
19 But to remember what's in the contested matter, they are  
20 bringing a Rule 60 motion to upset the sale order and things  
21 like that. They have not withdrawn that aspect of it.  
22 That's the reason why we sought to participate in the  
23 contested matter.

24 When you read through the draft -- the complaint  
25 that -- that's going to be filed, there are elements as to

1 whether the lock up agreement which gives GM Canada a post  
2 -- a release should somehow be potentially vitiated, which  
3 obviously affects new GM and the sale order. These are very  
4 critical issues for new GM and a reason why it needs to  
5 participate in this matter.

6 And that's the reason why -- but we're not looking  
7 to -- to take what is an objection to claim matter and try  
8 to say that that is a new GM prerogative. But we will be  
9 saying that -- that as part of the sale order there were  
10 certain assets that conveyed to new GM that the GUC Trust  
11 may not pursue and that they are trying to do that.

12 And -- and to pick up on Mr. Zirinsky's point, it  
13 didn't seem to be a -- too appropriate, especially in light  
14 of Your Honor's prior remarks at other status conferences,  
15 that you were interested in any kind of dispositive motions  
16 to at least narrow the dispute. I don't think the dispute  
17 goes away. I think there will be an evidentiary trial on  
18 the claims itself.

19 But one of the things that we try to do in  
20 responding to the ceiling motion is to try to address the  
21 fact that there's a lot of things in there that we think are  
22 inappropriate to be brought. And, in fact, one of the  
23 reasons why this complaint was revised was because there  
24 were factual errors that they corrected themselves when we  
25 pointed them out to them. They didn't correct all of it.

1 And we're hoping that at the conclusion of the  
2 discovery of the depositions that we may be able to address  
3 to Your Honor certain issues that will streamline any kind  
4 of evidentiary trial.

5 For example, I have a hard time envisioning at the  
6 end of the day why the committee, now the GUC Trust, should  
7 be able to vitiate the sale order. That is an element  
8 that's still here, but we hope that that's not going to be  
9 an issue that's in the evidentiary trial.

10 The GUC Trust may come to that conclusion itself  
11 at the -- at the end of the depositions. They may come to  
12 the conclusion at the end of the depositions that there was  
13 no improper post-petition transaction.

14 Therefore, I didn't want to try to force that  
15 issue now. I want them to either evolve to what I think  
16 would be the right decision or to have the opportunity to  
17 address that to Your Honor so that you don't have an eight-  
18 day trial, but you have a much shorter streamline trial.

19 I also think, Your Honor, that this case would --  
20 would have the benefit of an adjourned status conference  
21 just so that Your Honor would be able to monitor what was  
22 going on, because it is going -- I mean, you -- Your Honor  
23 knows that there's potentially nineteen depositions in this  
24 case. I mean, the depositions including Weil, Gotshal,  
25 Kramer, Levin, the government, the U.S. government, the

1 Canadian government. That's the wish list that people have  
2 in this case in connection with this noteholder dispute.

3 Now they want to try to do it. I can't tell them  
4 they shouldn't take their depositions now, but I do know  
5 that they're -- they're certainly going to the far -- the  
6 farthest boundary of what is relevant for purposes of  
7 whether certain claims filed in this case should be deemed  
8 disallowed or -- either in total or partial.

9 So I think we need another status conference date,  
10 and it could be just a holding date to report to Your Honor.  
11 But if we're actually going to get this case to be tried in  
12 August or to be resolved in August, I think that it needs  
13 further judicial monitoring of what's going on because, as  
14 you can see from the ceiling motion response that we filed,  
15 we are terrifically unhappy with some of the things that are  
16 happening here, but we have decided that now is not the  
17 right time to further address those issues.

18 But we do think they need to be further addressed  
19 and we do reserve the opportunity to do so before an  
20 evidentiary trial. We just think that Your Honor has to let  
21 them go through the process of the depositions, but some of  
22 these depositions are very, very far ranging and -- and we  
23 think are -- are not necessarily appropriate. But we're not  
24 going to do the noteholders' bidding. We -- we're going to  
25 protect our interest and do what's required under the lock-



1 up agreement.

2 THE COURT: Uh-huh.

3 Mr. Dublin, anything to add?

4 MR. DUBLIN: No, Your Honor.

5 THE COURT: All right.

6 Mr. Fisher, Mr. Zirinsky, the way that some people  
7 talked about it was as the claims objection. Am I right in  
8 assuming that it also includes trial on the equitable  
9 subordination and equitable disallowance claims?

10 MR. FISHER: Yes, Your Honor.

11 THE COURT: Mr. Zirinsky, you agree?

12 MR. ZIRINSKY: That's in their complaint, Your  
13 Honor, yes.

14 THE COURT: Okay. All right. Anything else,  
15 anybody?

16 All right. Here's what we're going to do, folks.  
17 You're going to give me two separate stipulations to which, if I  
18 understand it correctly, there would be four parties each.  
19 One dealing with scheduling and one dealing with  
20 intervention for new GM into the adversary, each of which,  
21 if reasonable, I'll so order.

22 The intervention stipulation should, in addition to  
23 giving new GM the right to intervene, to which I think it's  
24 plainly entitled, either agreements or reservations of  
25 rights with respect to matters that are addressed in my

1 Adelphia decision that was execute -- that I issued shortly  
2 after term loan lenders Caldor was issued.

3 And if I recall correctly there was a decision of  
4 the Second Circuit, in a case whose name I've forgotten,  
5 that at least seemingly approved things I said in that case,  
6 and Judge Chin (ph) who I think was then a district judge,  
7 and I think Sunbeam, wherein it was stated or implied that  
8 intervention is not the same as owning causes of action.  
9 You'll have reservations of rights on those things, but put  
10 in as much as you can that you can agree upon.

11 I think Mr. Steinberg's recommendation that there  
12 be a status conference between now and August is a good one,  
13 but I need you to put your noodles together to give me a  
14 recommendation, jointly, if possible, on the zone of time  
15 when you think that would be most productive.

16 I'll tell you guys now that you'll have at least  
17 three trial dates -- or three trial days in the week of  
18 August 3rd, and if my schedule permits more, but I don't  
19 know yet what I'm going to be able to give you.

20 I sense from what you're saying now that unless  
21 either side hits a home run on dispositive motions or  
22 narrowing motions or whatever Mr. Zirinsky calls it, we're  
23 not going to finish the week of August 3rd no matter how  
24 many days I give you, but that will at least be a start.

25 Lastly, I want you to focus, if you're thinking

1 about the motions of the type that Mr. Zirinsky talked  
2 about, what kind of bang for the buck any such motion would  
3 result in, even if successful, because I care about the  
4 incremental benefits of those, and trying an extra issue or  
5 two when you're having a trial anyway doesn't get you that  
6 much more or less than it might if that issue were to go  
7 away.

8 All right. Anything else, either side?

9 All right. Five-minute recess, only five, and  
10 then I'll take the GUC Trust funding issues.

11 THE CLERK: All rise.

12 (Recess at 11:05 p.m.)

13 THE COURT: Have seats, please.

14 All right. On the GUC Trust motion for leave to  
15 liquidate securities.

16 Let me get appearances and then ask you all to sit  
17 down.

18 MR. WILLIAMS: Your Honor, Matthew Williams,  
19 Gibson, Dunn and Crutcher for the GUC Trust and the  
20 Avoidance Action Trust administrator.

21 THE COURT: Okay, Mr. Williams.

22 MR. WILLIAMS: Oh, I'm sorry, Your Honor. And  
23 with me is my colleague, Keith Martorana and my partner,  
24 Mitchell Karlan.

25 THE COURT: I'm sorry. I couldn't hear your

1 colleagues names, Mr. Williams.

2 MR. WILLIAMS: Mitchell Karlan, Your Honor.

3 THE COURT: Karlan?

4 MR. WILLIAMS: And -- Mitchell Karlan and Keith  
5 Martorana.

6 THE COURT: Okay.

7 MS. LEARY: Good morning, Your Honor. Maureen  
8 Leary on behalf of the State of New York.

9 THE COURT: All right, Ms. Leary.

10 MR. DUBLIN: Good morning, Your Honor. Phil  
11 Dublin, Akin Gump on behalf of Green Hunt Wedlake.

12 THE COURT: All right. Mr. Zirinsky.

13 MR. ZIRINSKY: Bruce Zirinsky, Your Honor,  
14 Greenberg Traurig, on behalf of certain noteholders.

15 THE COURT: All right. Mr. Jones for the U.S.

16 MR. JONES: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. JONES: David Jones, U.S. Attorney's Office.  
19 Thank you.

20 THE COURT: Right.

21 Okay. Folks, make your presentations as you see  
22 fit, but I want you to address some particular questions and  
23 concerns that I have, because I have problems with positions  
24 by both sides.

25 As Green Hunt Wedlake properly notes I do approach

1 objections on the part of Green Hunt Wedlake and the Nova  
2 Scotia bondholders with skepticism where I'm seeing once  
3 again -- and I don't know how many times I've seen this over  
4 my judicial tenure -- efforts to attack ones adversary  
5 through the purse strings.

6 But with that said, I do have concerns about  
7 several aspects of the request.

8 When you look at it with a less litigation driven  
9 view as New York State does, although I well understand that  
10 New York State is in litigation with the estate as well, I  
11 don't see a discrimination issue; that is, an issue vis-à-  
12 vis different treatment of creditors, although just as I  
13 made creditors deal with the vagaries of movements in the  
14 stock market, vis-à-vis delays in getting paid, I am  
15 strongly inclined to do the same for professionals and for  
16 anyone else who's going to be getting money out of a stock  
17 that by necessity can go up or down in value.

18 Other issues, however, are more troublesome to me.

19 Both sides, I don't see that much of a ripeness  
20 issue with respect to 2011 cost overruns and efforts to fund  
21 those, but I do see ripeness issues with respect to expenses  
22 anticipated for 2012. And I want both sides to address  
23 whether my view, based on my reading of the briefs in that  
24 regard, should be modified.

25 I was surprised and disappointed to see how much

1 people were talking about for tax-related matters,  
2 especially since -- and you can correct me -- but I could  
3 swear that I was told by Tom Mayer (ph) that if I decided  
4 the issue of the ownership controversy between the U.S.  
5 government and the GUC Trust -- excuse me -- the Avoidance  
6 Action Trust by the December 15th deadline that Mr. Mayer  
7 told me about that that had put the issue of disputed  
8 ownership assets off the table from a tax perspective. And  
9 suddenly the need to spend what seems to be a huge amount of  
10 money on tax issues is one where I need some help.

11 I cannot for the life of me see how the GUC Trust  
12 or the Avoidance Trust, either one, can be spending more  
13 than a peppercorn on the term loan action since you're both  
14 -- the GUC Trust/Avoidance Trust on the one hand -- I guess  
15 it's the Avoidance Trust here -- and JP Morgan on the other  
16 would -- I would have thought be doing nothing more than  
17 waiting for my decision on the cross-motions for summary  
18 judgment, which are now sub judice.

19 The issue, it seems to me, under the plan  
20 documents is not whether Wilmington Trust and the others can  
21 ask for me to authorize the sale of securities, but whether  
22 I should grant it. And I ask both sides whether I'm a  
23 rubber stamp on that issue on the one hand or whether I do  
24 have a responsibility to be determining whether the  
25 creditors in this case are entitled to their money's worth

1 in terms of the management of the trust assets going  
2 forward.

3 A statement was made to me, which all seem to  
4 acknowledge was made to me, that going forward the GUC Trust  
5 was on a detailed and inflexible budget, or words to that  
6 effect, and when I overruled an objection by Ms. Leary and  
7 maybe one or two others where they had then expressed as a  
8 confirmation objection failures to provide more formalized  
9 procedures for cost management that was one of the things  
10 that I had been told would form the basis for that  
11 conclusion. And the question that I now have for you all is  
12 whether and to what extent I should hold people to that.

13 I also want both sides to address the extent, if  
14 any, to which I should slice and dice the particular  
15 requests for relief or the particular funding requests by an  
16 applicant by applicant basis or a cause for relief in that  
17 basis.

18 I am particularly troubled by requests where  
19 parties proposed to me and to the creditor community that  
20 they get paid X-hundred-thousand-dollars or \$50,000 or  
21 \$100,000 per month, and now determine that that wasn't a  
22 good deal for them. That is a matter of concern to me.

23 It could have been drafted; that is the underlying  
24 trust documentation could have been drafted kind of like the  
25 contracts that I dealt with when I was in the Air Force on a

1 cost plus fixed fee basis and people chose not to do that.

2 I also see more incremental base -- benefit in the  
3 services provided by Jay Alix than some of the others, but  
4 people can and should address that.

5 Also, if I understand the figures correctly, there  
6 are about three-and-a-half-million bucks in cost overruns  
7 for 2011 which, if I'm not mistaken, are about half for  
8 counsel and I believe the other half are for financial  
9 advisory services.

10 I want to know what percentage of the total they  
11 are and I want to get a better handle on why they were  
12 incurred and how I deal with the tension between -- in a  
13 situation where it was expressly agreed that there wouldn't  
14 be fee apps, wouldn't be U.S. Trustee review, wouldn't be  
15 fee examiner review, but the fees were nevertheless  
16 presumably assumed to be subject to some reasonableness  
17 test.

18 With that said I'll let you guys address those  
19 issues, starting with you, Mr. Williams.

20 As implicit in what I said, I am concerned about  
21 the creditors in this case getting their money's worth, and  
22 I'm concerned about avoiding prejudice or at least material  
23 prejudice to the creditors in this case who are looking to  
24 the leadership of the GUC Trust to continue to deliver value  
25 to them as this claims process is continuing.



1 MR. WILLIAMS: Thank you, Your Honor. Matthew  
2 Williams for Gib -- of Gibson, Dunn and Crutcher for  
3 Wilmington Trust in its capacity as GUC Trust administrator  
4 and the GUC Trust -- and the Avoidance Action Trust  
5 administrator.

6 I'll -- if it's okay with Your Honor, I'll get to  
7 right to your questions, although I would like to just give  
8 you a brief update of the status of some discussions we've  
9 had with various parties.

10 THE COURT: Okay. Go ahead, please.

11 MR. WILLIAMS: First, in connection with the tax  
12 issue, we had initially requested a \$17 million reserve of  
13 -- of tax, not to sell the \$17 million worth of stuff, but  
14 to transfer it to the Avoidance Action Trust in the event a  
15 tax issue arose.

16 We've subsequently withdrawn that request. We've  
17 been having numerous discussions with the IRS as well as  
18 internally and ultimately we've determined that we're not  
19 going to need that contingency funding for that \$17 million.  
20 So that's been withdrawn.

21 THE COURT: That's obviously very helpful. To  
22 what extent, then, am I asked to authorize sales of  
23 securities for other tax advice or does that take it all off  
24 the table?

25 MR. WILLIAMS: No. There's still -- we still do

1 need tax advice, Your Honor. There are still a lot of tax  
2 issues ongoing. Most of that's with -- again, how this  
3 works, if Your Honor will recall, is tax advice is generally  
4 dealt with, at least with respect to the GUC Trust as this  
5 reporting and transfer costs, notwithstanding the fact that  
6 it doesn't deal with reporting and transfer, given the fact  
7 that the Department of Treasury was not willing to fund that  
8 we -- we -- we agreed that it would come out of reporting  
9 and transfer cost, but --

10 THE COURT: What do you mean by recording and  
11 transfer? I thought that whatever other people disagree  
12 with and -- when you do it on 363 sales, if you transfer  
13 assets under a plan you're off the hook on recording and  
14 transfer taxes.

15 MR. WILLIAMS: No, no, no, I'm sorry. Reporting  
16 with a P, Your Honor, reporting and transfer. It's a  
17 defined term in the GUC Trust agreement.

18 If Your Honor will recall, the GUC Trust agreement  
19 -- and the plan itself provided that it -- or anticipated  
20 that the GUC Trust units would actually be transferable. In  
21 order to do that we, the GUC Trust, are going to incur what  
22 are called -- what we -- what is defined in a GUC Trust  
23 agreement as reporting and transfer costs.

24 THE COURT: As a proxy for 34 Act and 33 Act  
25 compliance?

1 MR. WILLIAMS: Yes. And in order to get up to  
2 speed and to deal with all sorts of issues that we're  
3 currently negotiating with the SEC.

4 But, in addition -- I'm sorry, I didn't mean to  
5 cut you off, Your Honor.

6 THE COURT: Well, it -- it had appeared to me, but  
7 I'll need to hear from Mr. Zirinsky or Mr. Dublin on this,  
8 that on that issue you didn't have opposition from the Nova  
9 Scotia bondholders and Green Hunt Wedlake.

10 MR. WILLIAMS: I think that's correct, Your Honor,  
11 but just to be clear, when we talk about reporting and  
12 transfer costs it's not -- you know, it's a bit of a  
13 misnomer in the trust agreement because the trust agreement  
14 -- reporting and transfer costs cover -- cover a couple of  
15 things. It covers the SEC stuff that we -- that I was just  
16 talking about, and it also covers certain -- this private  
17 letter ruling that we're seeking with the IRS, and it also  
18 covers the dispute over the term loan ownership litigation.  
19 Obviously, treasury wasn't willing to fund that because  
20 they've taken the position on appeal now that they own the  
21 term loan ownership litigation.

22 So my only point being, Your Honor, is when we  
23 talk about reporting and transfer costs, it's actually not  
24 just reporting and transfer costs. There are some other  
25 things in there as well. It's not all tax advice, but it's

1 a lot of the tax analysis goes into the reporting and  
2 transfer costs. Other tax advice, with respect to the  
3 Avoidance Action Trust, we still do need.

4 For instance, Your Honor, the Avoidance Action  
5 Trust agreement itself requires -- doesn't -- doesn't  
6 authorize, it requires the Avoidance Action Trustee to do a  
7 tax valuation of the underlying litigation. That actually  
8 takes time and money and we have to hire professionals to do  
9 it. So --

10 THE COURT: I mean, you know, I was a general  
11 purpose litigator before I came over to the bankruptcy side.  
12 Is there some way by which your guys think that they should  
13 be valuing the litigation other than estimating the  
14 probability that the Avoidance Trust is going to win on the  
15 one hand or JP Morgan and its syndicate are going to win on  
16 the other?

17 MR. WILLIAMS: Yes, absolutely, Your Honor. There  
18 is a number of different variables. And, again, I haven't  
19 been hired to do the analysis, but I've seen drafts of it  
20 and there are a number of variables, including the value of  
21 the leftover collateral, for instance.

22 THE COURT: I see now.

23 MR. WILLIAMS: There's also collection risk.

24 THE COURT: Because underlying that is the point  
25 that while the UCC-3 in question involved the biggest chunk

1 of collateral, it wasn't all the collateral.

2 MR. WILLIAMS: Exactly, Your Honor. And it -- and  
3 another issue is collection risk, obviously; another issue  
4 is time value of money, discounting to present value.

5 We as the GUC Trust administrator have to prepare  
6 a tax analysis that's ultimately going to hold up to an  
7 audit if that ultimately comes, and because of that if --  
8 these are the kind of things, Your Honor, that seem simple  
9 when you first look at the trust agreement, or you know, you  
10 prepare a tax analysis of the avoidance action, but when you  
11 actually delve into it and -- and again, I haven't been  
12 hired to do that analysis, so, you know, I can speak  
13 generally to it, but it takes time and it takes money. And  
14 at the end of the day it's Wilmington Trust and to a lesser  
15 extent, but to a significant extent the GUC Trust monitor  
16 that have to sign off on these analyses. And because of  
17 that, you know, we want to make sure that it's done right.

18 THE COURT: The GUC Trust monitor is FTI?

19 MR. WILLIAMS: Yes. The FTI is the GUC Trust  
20 monitor and the Avoidance Action Trust monitor, Your Honor.

21 THE COURT: Okay.

22 MR. WILLIAMS: With -- and one other, you know,  
23 speaking up for my former colleague, Tom Mayer, he was -- he  
24 was -- you know, we all thought that if Your Honor ruled we  
25 wouldn't have the issue of the disputed ownership fund.

1 Treasury appealed obviously, and that threw a bit of a  
2 monkey wrench into the works. But, you know, as I stated  
3 earlier, we're no longer seeking to send that \$17 million in  
4 stock over for a number of reasons. One, because -- and,  
5 again, with the -- with the idea that things are always more  
6 complicated than they seem in this matter -- it could have  
7 potentially created 12(g) reporting for the Avoidance Action  
8 Trust had we done that --

9 THE COURT: 12(g) under the 34 Act?

10 MR. WILLIAMS: Yes, because we would have had  
11 holders of over -- over -- I believe it's 500 holders, Your  
12 Honor, and over --

13 THE COURT: Requiring you to file a Form 10?

14 MR. WILLIAMS: Yeah. So rather -- so that was one  
15 reason we ultimately determined not to do it.

16 Subsequently, we've been in continued discussions  
17 with the IRS, and it turns out that the IRS, so long as we  
18 get some other issues resolved with them, that they're not  
19 going to take the position that the GUC Trust is a disputed  
20 ownership fund, notwithstanding treasury's appeal. So --  
21 so that's a good thing. But, again, this is the kind of  
22 stuff that is taking time and money to resolve.

23 What -- a couple of other just general updates,  
24 Your Honor.

25 The Nova Scotia trustee had filed a limited

1 objection and their limited objection was really a request  
2 for more information; you know, what professionals were  
3 over, by how much, how much did we anticipate professionals  
4 were going to be over in 2012?

5 We filed a couple of declarations. We filed the  
6 declaration of David Vinasky (ph) of Wilmington Trust where  
7 we tried to outline that information. We filed a  
8 declaration by FTI, and we filed a declaration by -- by Alix  
9 Partners, all, you know, dealing with certain issues. Each  
10 of them are here to -- for cross-examination to the extent  
11 that they --

12 THE COURT: Well, you know that's not the way we  
13 deal with contest -- contested evidentiary issues either  
14 under the local rules of this Court, my case management  
15 order, or even Rule 9014; that the return date on a motion  
16 is never an evidentiary hearing.

17 MR. WILLIAMS: I -- I apologize, Your Honor. I --  
18 I thought that we had complied with Your Honor's chambers  
19 rules by submitting those declarations and making the  
20 witnesses available here to testify.

21 THE COURT: Did you contact my chambers and tell  
22 me that you had contemplated having an evidentiary hearing  
23 today? These affidavits, if I recall there were three of  
24 them, were submitted as part of a reply brief.

25 MR. WILLIAMS: That's correct, Your Honor. If I

1 could just confer with my colleague for one second.

2 (Pause)

3 MR. WILLIAMS: Your Honor, we had provided those  
4 -- the answer to your question is unfortunately no, we did  
5 not contact chambers and say that we wanted an evidentiary  
6 hearing today. I apologize for that, Your Honor, it was an  
7 oversight on my part.

8 To the extent that -- you know, we had provided  
9 those declarations because the parties had asked for  
10 additional information. If there's a need to schedule a  
11 subsequent evidentiary hearing obviously we'd be amenable to  
12 that.

13 THE COURT: If your affidavits address their  
14 concerns and they're satisfied of course the issue goes  
15 away.

16 MR. WILLIAMS: Yeah, well --

17 THE COURT: But if there are material disputed  
18 issues of fact, the National Bankruptcy Rules, the way that  
19 9014 was amended to deal with evidentiary hearings, and what  
20 I have said in baby talk in my case management orders this  
21 is certainly miscontrol.

22 MR. WILLIAMS: We understand, Your Honor.

23 THE COURT: Okay. Continue, please.

24 MR. WILLIAMS: But I guess at least with respect  
25 to Nova Scotia -- the Nova Scotia trustee, the good news is,



1 is that the declarations did resolve their concerns.

2 THE COURT: Okay.

3 MR. WILLIAMS: We -- now again, I -- that is not  
4 the case or at least I can't speak for, you know, the other  
5 two objecting parties, but with respect to Nova Scotia, you  
6 know, we had helpful discussions, they told us what they  
7 wanted, we tried to include, you know, by line item in the  
8 declarations, you know, by professional, who's over by how  
9 much and the like, and because of that I believe Nova Scotia  
10 has -- the trustee has agreed to withdraw its objection.

11 We've also agreed in order to provide full  
12 disclosure just generally to all parties in interest that on  
13 a going forward basis the GUC Trust files what are called  
14 6.2 reports -- it's 6.2 because it's Section 6.2 of the GUC  
15 Trust agreement -- and we've agreed going forward -- these  
16 are quarterly reports filed with the SEC and the like --  
17 we've agreed that we're going provide that information on a  
18 going forward basis in the 6.2 reports.

19 So there's going to be line items akin to what's  
20 in the Vinasky declaration, I believe it's on page 1 of  
21 Exhibit B of the Vinasky declaration, we're going to provide  
22 a form like that going forward so people can get an idea as  
23 to what professionals are spending and how much.

24 With respect to Your Honor's particular questions,  
25 I'm happy to just delve right into them.

1 Your first question was about ripeness, why are we  
2 asking Your Honor to sell stock for 2012 anticipated  
3 overages, notwithstanding the fact that those fees and  
4 expenses haven't been incurred yet? There's a couple of  
5 reasons, Your Honor.

6 First and foremost is that this process is  
7 expensive. Any time we have to sell stock we have to  
8 notice, you know, every allowed claimant, every disputed  
9 claimant, it's an expensive process, and given the fact that  
10 we were over by 011 and we were making the motion to -- you  
11 know, again, it's a line item budget -- so given the fact  
12 that certain professionals were over for 2011 and we were  
13 making the motion the GUC Trust administrator thought that  
14 it was prudent given the fact that based upon all the  
15 information available to it we are going to be over for  
16 2012, that it made sense to make this motion now.

17 So that's really the first reason.

18 THE COURT: How expensive is it?

19 MR. WILLIAMS: Your Honor, I don't -- the answer  
20 is I don't know. I mean we -- you know, obviously you saw  
21 our motion and our reply so this has been a relatively  
22 expensive process. The noticing itself is expensive. We,  
23 Wilmington Trust, you know, noticing the bondholders  
24 actually isn't that expensive because we can just push it  
25 out through DTC, but noticing the actual claimants it's,

1 right, it's every claimant, every --

2 THE COURT: Is there a reason why I was -- the  
3 documentation was structured to provide notice to every  
4 creditor --

5 MR. WILLIAMS: Yes, Your Honor.

6 THE COURT: -- instead of the way we more commonly  
7 do it in Chapter 11 cases?

8 MR. WILLIAMS: I believe so, Your Honor. And the  
9 reason for that is because what Your Honor eluded to  
10 earlier, which is this is an important motion and creditors  
11 who are otherwise entitled to this stock should get notice  
12 as to how their stock is being used and why. And I believe  
13 it was the creditors' committee's concern that if the GUC  
14 administrator was going to make a determination that it  
15 wanted to sell stock because it was the best interest of  
16 creditors that every creditor should get notice of it.

17 THE COURT: Uh-huh. Continue.

18 MR. WILLIAMS: And in this vain, Your Honor, you  
19 know, I do think it's telling, obviously it's not  
20 dispositive nor near disclose positive, but no creditor with  
21 merely allowed claims has objected to the motion. So I do  
22 think that the process works. It's expensive, but it works.

23 Also with respect to ripeness and because I think  
24 in part that the document requires that we have to notice  
25 everybody under the sun, the document also only allows for

1 -- the GUC Trust agreement itself only allows us to make  
2 this motion on a semiannual basis. So we're not allowed to  
3 come in every couple of months and make a motion to sell  
4 stock, the document explicitly says we can only make a  
5 motion on a semiannual basis.

6 So, you know, I've got a shot here, I've got a  
7 shot at some point in the future. So that's the second  
8 reason.

9 And then the third reason is that the GUC Trust  
10 administrator has determined that it wants to incentivize  
11 its professionals and make sure that they're paid on a  
12 timely basis so we can get this work done quickly and get  
13 out quickly.

14 How the budget works, how the budget works with  
15 treasury we're allowed -- you know, the GUC Trust is allowed  
16 to pay professionals for 2012 up to a certain amount and  
17 that's it, and then they have to wait till 2013 and then we  
18 can start paying them again out of the 2013 budget. What we  
19 wanted to avoid is any kind of slow down in the work.

20 We know that we're going to be over budget based  
21 upon the -- based upon all the due diligence that the GUC  
22 Trust administrator has done, and we want to be able to make  
23 sure that professionals can get paid so we can continue to  
24 get this work done in a timely manner. So because of -- for  
25 all of those reasons we do think that this motion is ripe

1 and that it makes sense to sell the stock now.

2 Now what we haven't done, Your Honor, we did  
3 reserve, you know, based upon -- we extrapolated out through  
4 2014 what we thought we were going need. We have not sought  
5 to sell stock for 2013 or 2014 because -- just because of  
6 the vagaries of it.

7 You know, 2012 it's relatively easy to figure out.  
8 I shouldn't say easy -- nothing is easy in this case,  
9 Your Honor -- but it's -- we have a relatively good handle  
10 on what 2012 is going to be, we think we know what 2013 and  
11 2014 is going to be, but the truth is we don't. Things  
12 continue to pop up, you know, new claims continue to get  
13 filed, you know, we continue to be sued and --

14 THE COURT: Wait. New claims continue to be filed  
15 --

16 MR. WILLIAMS: Yeah.

17 THE COURT: -- after the bar dates?

18 MR. WILLIAMS: After the bar date new claims  
19 continue to be filed, Judge. I -- look, it's -- they're  
20 easy to knock out, but you know --

21 THE COURT: You can do it with a second year  
22 associate can't you --

23 MR. WILLIAMS: Yes, but Your Honor --

24 THE COURT: -- after he or she has been admitted  
25 to the bar for about two weeks?

1 MR. WILLIAMS: Yes. Your Honor, to be clear, new  
2 claims being filed is not -- we're not spending a lot of  
3 time and effort on it, but it's one of many things. Right,  
4 we've been sued as Your Honor knows we have to come in here,  
5 and you know, sometimes people withdraw the suits  
6 consensually sometimes they don't.

7 But in any event, so for 2012, you know, we think  
8 we have a good handle on it. For 2013 and 2014 we think we  
9 have an okay handle on it but we're not sure, and so we  
10 hadn't sought, even though the stock is reserved, because  
11 per the GUC Trust agreement we're not required to seek Court  
12 authority to reverse the stock, just to sell it, we've  
13 withheld stock from distribution in case that it turns out  
14 that, you know, 2013 and 2014 are over as well. But we're  
15 not seeking to sell that at this time, because the truth is  
16 we may not need it.

17 We hope that we don't need it and we hope that we  
18 can make -- distribute that stock out to creditors, but for  
19 2012 we are confident that we're going to need the vast  
20 majority of this money.

21 With respect -- I should say one caveat, Judge,  
22 which is everything I just said it's a little bit different  
23 with respect to the Avoidance Action Trust for one reason,  
24 which is notwithstanding the fact that we are seeking to  
25 sell stock just for 2012 for the GUC Trust, for the

1 Avoidance Action Trust we're seeking it to fund what we  
2 think is going to be through the life of the trust. And the  
3 reason for that is it harkens back to what I had said --  
4 talked earlier about, which is this -- these transferable  
5 units of the GUC Trust.

6           You know, we've been, and as noted in our papers,  
7 we've been in lengthy discussions with is SEC about  
8 implementing a plan provision that would have to GUC Trust  
9 units transferable. Right now, you know, today taking a  
10 snapshot, the GUC Trust and the Avoidance Action Trust have  
11 the exact same beneficiaries, i.e., unsecured creditors of  
12 the estate, they're both in essence frozen in amber. So now  
13 there's no prejudice to GUC Trust holders to the extend that  
14 we were to fund the Avoidance Action Trust with GUC Trust  
15 cash because they're the same beneficiaries.

16           Obviously, you know, in 2013 we're hopeful. You  
17 know, that may not be the case because the GUC Trust units  
18 may be transferring, and it's for that reason that we've  
19 sought to fund the Avoidance Action Trust, you know, through  
20 2014 right now.

21           So that was the -- so you know, I said we're not  
22 selling stock for 2013/2014 for the GUC Trust, but we are  
23 seeking authority to do that for the Avoidance Action Trust.

24           With respect to the -- Your Honor had had  
25 questions about the -- you know, you assumed that we're just

1 waiting on the term loan avoidance action, why is there --  
2 you know, why do we need more funding for that now? I think  
3 I addressed it earlier, which is, you know, a couple of  
4 things.

5 The Avoidance Action Trust provides for a couple  
6 things. One it provides that we're acquired to do that tax  
7 valuation, which you know, I described earlier, which isn't  
8 as simple as it seems. It also requires -- doesn't give us  
9 permissive authority, it requires us to get insurance, and  
10 obtaining insurance --

11 THE COURT: What kind of insurance?

12 MR. WILLIAMS: You know, liability insurance for  
13 the GUC Trust monitor in the avoidance action -- I'm sorry  
14 -- for the Avoidance Action Trust --

15 THE COURT: Is this analogous to D&O insurance?

16 MR. WILLIAMS: Yes, it is, Your Honor. And I  
17 would have thought, Your Honor, that the D&O insurance would  
18 have been very cheap for this trust. The truth of the  
19 matter is it's not. It's very expensive. There's -- I  
20 believe it's a \$2.5 million deductible that, you know, we're  
21 not seeking -- that we need to know that we have, so we've  
22 got to sell stock for that just to have it, and it's also I  
23 believe the insurance itself it's -- if I'm correct, and  
24 it's in our -- it's in the exhibits, I believe it's  
25 something like a million two. It's expensive. And one of



1 the reasons for that is --

2 THE COURT: The premium for it is a million two?

3 MR. WILLIAMS: Yes, Your Honor. And the reason --  
4 and again, this is required by the document that says -- and  
5 you know, we with the monitor, the Avoidance Action Trust  
6 administrator, you know, we went out looking for insurance  
7 and we were surprised how expensive it was, but that's the  
8 best deal that we could get. People were having a hard time  
9 getting a handle about, you know, what kind of animal this  
10 document is, and for that reason insurance was much more  
11 expensive.

12 So it's those types of things that keep popping  
13 up, which is why we need funding. And obviously the  
14 prosecution of the action itself, although it's currently  
15 stayed, ultimately it's not going to be stayed, and so we're  
16 going to -- the truth is we're going to need more money to  
17 fund that litigation.

18 I don't think that on a billion five action  
19 whatever we have remaining in -- I don't think we're going  
20 to have anything remaining in the Avoidance Action Trust  
21 after we pay the insurance and the like, so the issue is,  
22 well, how do we fund the action? And there were really --  
23 there was a decision --

24 THE COURT: Well --

25 MR. WILLIAMS: Go ahead, Your Honor.

1 THE COURT: -- forgive me, Mr. Williams.

2 MR. WILLIAMS: Sure.

3 THE COURT: But you said a couple of minutes ago  
4 that the reason for the valuation services was that you  
5 can't measure the value of the litigation even if one, by  
6 the gross amount of the debt that was paid to JP Morgan  
7 Chase in satisfaction of the -- as agent I guess in  
8 satisfaction of the underlying obligation because there's  
9 other collateral out there, and of course you've got to  
10 arbitrage it by the likelihood of success.

11 I take it you're not retreating from any of those  
12 observations, so it isn't exactly a one and a half billion  
13 dollar litigation, especially since if you win you still got  
14 to give JP Morgan Chase and its syndicate the unsecured  
15 claims that are undisputed.

16 MR. WILLIAMS: I agree with that 100 percent, nor  
17 am I retreating from that statement.

18 There's -- to be frank, there's other issues with  
19 the litigation as well. There's collection risk because  
20 we've got to go out to each, you know, hedge fund that, you  
21 know, bought into this and see -- you know, we -- you know,  
22 see if -- so there's all sorts of issues, I agree, but at  
23 the end of the day, right, even -- I don't want to -- I  
24 don't want to disclose obviously what our valuation  
25 ultimately is, but I think it's fair to say that it's

1 significant, not withstanding all of those contingencies and  
2 issues that, you know, Your Honor just described, and I  
3 think it's to -- I think it's fair to say -- actually I know  
4 it's fair to say that the Avoidance Action Trust  
5 administrator in its fiduciary duties for the holders of  
6 units in that trust has determined that it makes sense to  
7 adequately fund it and it's going to benefit all unsecured  
8 creditors, and it wasn't a decision we took lightly.

9           There were other things we could have done,  
10 Your Honor, with respect to the Avoidance Action Trust, and  
11 we've explored some of those alternatives.

12           For instance, we explored and we're in the process  
13 of exploring -- to the extent that Your Honor doesn't grant  
14 the motion with respect to the Avoidance Action Trust --  
15 alternative funding arrangements with both counsel and with  
16 outside lenders who, you know, might be willing to loan  
17 money to the Avoidance Action Trust.

18           But based upon our, you know, preliminary  
19 discussions with some of those lenders and what that -- what  
20 that construct would be they're going to want a significant  
21 piece of -- for all the contingencies and you know  
22 uncertainties in the action we just described, any money  
23 that they're going to loan they're going to want a  
24 significant piece of the avoidance action litigation, the  
25 underlying litigation. And the avoidance action

1 administrator and the avoidance action monitor and of course  
2 their fiduciary duties believe that it's more responsible  
3 and it's going to be -- hopefully return a larger recovery  
4 to unsecured creditors doing it this way.

5 And again, which is why we noticed it out to all  
6 the creditors and all creditors have had an opportunity to  
7 come in and object.

8 But -- so we're comfortable and we believe that  
9 this is the best approach.

10 THE COURT: Continue, please.

11 MR. WILLIAMS: Your Honor had asked if it was  
12 appropriate for you to rubber stamp this motion. I --  
13 absolutely not. I -- neither the -- certainly from the GUC  
14 Trust administrator's point of view it is not appropriate  
15 for you to rubber stamp this motion. It's -- this is an  
16 important motion.

17 We, the -- Wilmington Trust, who is chair of the  
18 official creditors' committee, we fought hard with treasury  
19 to try to get as much funding for this trust as we could,  
20 and the truth is we did the best that we could, and  
21 unfortunately notwithstanding all of our efforts and the  
22 committees' efforts and the debtors' efforts, there's not  
23 enough money to resolve all the claims and get distributions  
24 out the door in a timely manner right now, there's just not.  
25 But the GUC Trust agreement provides -- you know,

1 anticipating this the GUC Trust agreement provided that the  
2 GUC Trust administrator could sell stock after a motion to  
3 all creditors and upon hearing to the Court. So I don't  
4 think you should rubber stamp it.

5 In the same vain though I would note that these --  
6 it's not as if these fees aren't reviewed. All the fees  
7 that are being sought here are, you know, are subject to a  
8 number of different reviews under the GUC Trust agreement,  
9 which we described, you know, back at confirmation, which  
10 remain in force today.

11 First, you know, given that treasury is funding  
12 the wind down all the bills go to treasury. All right, so  
13 treasury, I think it's fair to say, has been a very tough  
14 negotiator in this case and I don't see why they would stop  
15 now with respect to the fees. So they get all of the fees.

16 Second, the GUC Trust monitor reviews all of the  
17 fee statements and after -- you know, after a 15-day waiting  
18 period, and then -- for reasonableness -- and as does the  
19 GUC Trust administrator, so there's three levels.

20 But then there's a fourth, right? Which is to the  
21 extent that --

22 THE COURT: All right, the first two being  
23 treasury and FTI?

24 MR. WILLIAMS: Yes, treasury, FTI.

25 The third being the GUC Trust administrator

1 reviews after that 15-day period.

2 THE COURT: Is that Alix or is that somebody else?

3 MR. FISCHER: No, that's my client, Your Honor.

4 That's Wilmington Trust.

5 THE COURT: Oh, that's Wilmington Trust.

6 MR. WILLIAMS: That's Wilmington trust, yeah.

7 THE COURT: All right, continue.

8 MR. WILLIAMS: And then on top of that any  
9 professional that goes over its line item budget for any  
10 year gets subject to a penalty, and the penalty is they  
11 don't get their 10 percent hold back until the end of the  
12 case.

13 And then on top of that is really the fifth layer  
14 of protection which is this motion, Your Honor, which is --  
15 and again -- and by the way I should note, that by this  
16 motion none of the professionals who have gone over budget  
17 for 011 or who are anticipated to go over budget for 2012  
18 are getting that 10 percent hold back paid. That's there  
19 until the conclusion of the case or until, you know, they're  
20 gone from the case, but they don't get that. And the GUC  
21 Trust administrator is not seeking authority to pay that  
22 right now.

23 These professionals went over budget and it may  
24 have been -- actually we think it was justified in these  
25 cases, but you know, the agreement says what it says, this

1 was the deal that treasury cut and we're stuck to live by  
2 it.

3 So we think -- the GUC Trust administrator thinks  
4 that this process is working.

5 We're in the procedure now where we've let the  
6 Court and all creditors know that, you know, we're over by  
7 this amount, we've given more information -- substantially  
8 more information than was ever acquired in the disclosure  
9 statement.

10 If you look at the disclosure statement budget,  
11 Your Honor, it's vague, and it was -- and maybe this was my  
12 fault, but in our initial motion that we made to the Court  
13 we in essence used the disclosure statement budget as kind  
14 of the proxy and we sort of laid it out, then when creditors  
15 asked for more information -- it wasn't that we were trying  
16 to hide the ball -- we said, okay, here's some more  
17 information, here's the by line item professional. But --  
18 so there's many layers of protection here on the fees.

19 I don't think that, you know, professionals who  
20 had -- because and again, one other thing I note,  
21 Your Honor, is the professionals who are doing most of the  
22 wind down work are the professionals who were involved in a  
23 lot of the case obviously, they're close to the case, they  
24 know the issues. I don't see why the minute that the plan  
25 goes effective that all these -- it's all these

1 professionals are going to raid the till and start over  
2 billing, especially because to the extent that one, we've  
3 got the budget, we're going to know that you're over budget  
4 and you're going to be subject to this 10 percent hold back.  
5 And moreover there isn't any certainty because -- that  
6 you're going to get paid, because again, we've got to make  
7 the motion to the Court and the GUC Trust administrator and  
8 the monitor and treasury all have to review the fees to see  
9 that they're reasonable.

10 THE COURT: Then why do I see partners litigating  
11 with prose's?

12 MR. WILLIAMS: Your Honor, partners litigating  
13 with prose's, I -- again, I am personally not close to the  
14 claims reconciliation issues.

15 As I said earlier, you know, I represent  
16 Wilmington Trust, I represent it as an indenture trustee  
17 during the case and as chair of the committee and so I  
18 stayed on with them in their kind of court for capacity as  
19 the GUC Trust administrator and the Avoidance Action Trust  
20 administrator.

21 To the extent that Your Honor has particular  
22 concerns about how certain of the claims reconciliation, you  
23 know, litigation has been done I've -- Mr. Joe Malinsky (ph)  
24 of Walagoshal (ph) is here in the courtroom and he can  
25 address any particular concerns Your Honor has about



1 particular claims or just the claims reconciliation  
2 procedures in general.

3 THE COURT: Go on.

4 MR. WILLIAMS: Your Honor had made reference and a  
5 number of the papers make reference to the detailed and  
6 inflexible budget. That is the case. I mean, and that's  
7 one of the reasons that we're here.

8 On an aggregate basis for 2011 we were actually a  
9 little bit under budget, the GUC Trust, but on the line item  
10 basis we were over. And -- but that's -- again, but the  
11 detailed on inflexible budget is one layer of control, but  
12 it was never anticipated nor does the document provide  
13 anywhere that professionals are only entitled to be paid  
14 from the budgeted amounts that's been authorized to be paid  
15 by treasury. What the document provides is to the extent  
16 that you go over we have to go through this process, and  
17 that's what we're going.

18 And again I'd note as I said earlier, that this  
19 detailed and inflexible budget, which it certainly is. I  
20 would note that, you know, when we realized we were going to  
21 be over budget for 2012 we went back and pushed on treasury  
22 and we said, look, we're over, you guys -- you guys did very  
23 well on your budget, you negotiated a good budget, but we  
24 need more money. And the answer is they said no. We asked  
25 if we could roll up the 2012 numbers into 2011, if we

1 pushed 2013, we tried to -- you know, we asked for all sorts  
2 of relief in connection with the budget and treasury's  
3 response was in essence no. So it is a detailed and  
4 inflexible budget.

5 But the problem with -- right, that's a good thing  
6 and a bad thing. Because to the extent -- right, it's good  
7 in that it keeps professionals honest, but it's bad to the  
8 extent that the GUC Trust administrator or the Avoidance  
9 Action Trust administrator isn't going to be able to  
10 compensate its professionals to do the work. Because if  
11 we're in that situation, Judge, this case is going to take  
12 longer. I really think it's going to take longer and it's  
13 not going to be a quicker case.

14 With respect to the proposed increases of the  
15 Avoidance Action Trust administrator and the Avoidance  
16 Action Trust monitor as well as the GUC Trust administrator  
17 and the GUC Trust monitor.

18 Again, Your Honor was correct, initially it has  
19 been -- set forth in the budget as flat fees for both  
20 Wilmington Trust as administrator and for FTI as monitor,  
21 and no one is seeking to recut that deal with respect to  
22 2011, that sort of is what it is.

23 The truth of the matter is and as we -- it's taken  
24 substantially more time not only for the professionals to  
25 resolve the claims and the like, but for Wilmington Trust

1 and FTI it's taken them substantially more time in this  
2 engagement.

3 And what the trust agreement provides, it doesn't  
4 provide that they're -- they get a flat fee, it says that  
5 they get their quote reasonable fee. So when --

6 THE COURT: Pause.

7 MR. WILLIAMS: Sure.

8 THE COURT: I didn't follow that. I thought that  
9 Wilmington Trust was getting 100,000 bucks per month for its  
10 services.

11 MR. WILLIAMS: It currently is, Your Honor, that's  
12 correct. It currently is. Wilmington Trust gets \$100,000  
13 per month for its services as GUC Trust administrator and  
14 Avoidance Action Trust administrator.

15 THE COURT: Now does the trust documentation say  
16 that notwithstanding that \$100,000 fee that the compensation  
17 to Wilmington Trust must be reasonable?

18 MR. WILLIAMS: Yes. Your Honor, the trust  
19 agreement itself doesn't make reference to the \$100,000 fee  
20 at all, the \$100,000 fee was based upon Wilmington Trust's  
21 initial proposal to the Department of Treasury and therefore  
22 it was included in a line item in the budget. The GUC Trust  
23 agreement itself and the Avoidance Action Trust agreement  
24 itself just say reasonable compensation, that's it.

25 And so when my client, the -- Wilmington Trust

1 came to me and said, look, I'm getting -- I'm spending a lot  
2 more time than we initially anticipated on this case, this  
3 \$100,000, although it's substantial, is not what we -- is  
4 not covering the amount of work that we're doing what are my  
5 rights? I said, look, you're entitled to reasonable  
6 compensation, but I think -- and again, the document is  
7 silent on this point -- but I said, look, as a practical  
8 matter given the fact that we're making this motion let's  
9 let all creditors know what you're proposed -- Your Honor, I  
10 would just reference section 9.7 of the GUC Trust agreement,  
11 and it says:

12 "Compensation and expenses. The GUC Trust  
13 administrator shall receive fair and reasonable  
14 compensation for its services to be paid out of the  
15 wind down budget cash in accordance with the budget  
16 prior to the final distribution date.

17 The GUC Trust administrator shall be entitled  
18 without the need for approval of the Bankrupt Court to  
19 reimburse itself from wind down budget cash on a  
20 monthly basis."

21 And then I go to the next sentence:

22 "In addition, to the extent the wind down budget  
23 cash is not sufficient to provide the GUC Trust  
24 administrator fair and reasonable compensation for its  
25 services or for reasonable out-of-pocket expenses it

1 shall be paid out of other GUC Trust administrative  
2 cash."

3 THE COURT: Now to what extent is the \$100,000  
4 embodied in a contract or other piece of paper?

5 MR. WILLIAMS: Your Honor, the only piece of paper  
6 that it was embodied in -- well, it's really two. There was  
7 an initial proposal that went to the Department of United  
8 States Treasury, and then it subsequently wound up in the  
9 line item of the budget itself, but that's really it.  
10 There's not a separate contract --

11 THE COURT: Proposal walks and talks a little bit  
12 like an offer. Was there any acceptance?

13 MR. WILLIAMS: I think it's fair to say that there  
14 was acceptance by treasury and that everybody assumed that  
15 this was going to be -- that the \$100,000 per month was  
16 going to be enough. But the proposal itself provided that,  
17 you know, that even in the proposal that to the extent that  
18 we reserve the right to revisit the fee -- that Wilmington  
19 Trust reserves the right to revisit the fee.

20 And the truth of the matter, Judge, is that  
21 Wilmington Trust is doing substantially more work than it  
22 was originally contemplated in this engagement, and because  
23 of that we think -- which is why -- you know, we noticed  
24 this out to every creditor, right, I said, look, there's not  
25 really a -- there's not really a provision in the GUC Trust

1 agreement that says, you know, how do you get -- how do you  
2 determine what's fair and reasonable for your compensation?  
3 You certainly can't agree with yourself, right, so I said,  
4 here -- the best way to do it, we're doing this motion to  
5 sell stock, let's notice up, because every creditor is going  
6 to get notice of this, this notice up every creditor, let's  
7 try to describe in some meaningful detail, you know, what  
8 your hours are and what you're doing and we'll let people --  
9 and we'll let the creditors decide if this is reasonable or  
10 not. That was the best thing that we could come up with.  
11 And to date three creditors objected and now it's down to  
12 two, and we've got to Nova Scotia trustee -- I'm sorry --  
13 the Nova Scotia trustee has withdrawn its objection, we have  
14 certain of the Nova Scotia bondholders that have objected,  
15 and I'm not sure if the State of New York -- they filed an  
16 objection, I'm not sure if they objected to this particular  
17 component of the relief or not, but those are the two  
18 parties that objected.

19 We submit that based upon the time and energy  
20 being utilized by Wilmington Trust in this engagement that  
21 the proposal -- the up size in the fee is reasonable based  
22 upon the up size in the work that they're doing.

23 I would also note that, right, in connection with  
24 the reporting and transfer costs, which I don't think any  
25 party has objected to, Wilmington Trust is doing substantial

1 work -- substantial work.

2 Nobody, you know, when this plan went effective  
3 back in -- when was it March or -- of 010 -- nobody  
4 envisioned -- right, well, the thought was that we were  
5 going to have sign off from the SEC on no action relief and  
6 we were going to be -- you know, we were going to be able to  
7 implement the plan on the transferability of the units. The  
8 SEC has come back and asked for numerous, numerous  
9 additional controls. They've asked in essence for full  
10 Sarbanes-Oxley compliance, we're going to be filing 10-K's,  
11 10-Q's, Wilmington Trust is taking on substantial additional  
12 liability risk and for that reason, you know, again we think  
13 it's appropriate that they be compensated for that.

14 And again, I don't think that any of the parties  
15 here have objected to that relief, but it's just another  
16 showing that the document itself never required that  
17 Wilmington Trust will be limited to \$100,000 per month on  
18 its flat fee.

19 I -- Your Honor had a question about Jay Alix  
20 Services, it was a little bit unclear to me what you were  
21 asking.

22 THE COURT: Well, I thought what Jay Alix was  
23 doing was fly specking the claims and providing assistance  
24 on claims objections.

25 MR. WILLIAMS: They are doing that, Your Honor,

1 but they're doing other things.

2 Again, for instance, with the reporting and  
3 transfer costs they've been helping the GUC Trust build --  
4 assist us in building up the controls and the like, so Alix  
5 is doing substantial other work as well.

6 But the answer is, Alix is doing a lot of work in  
7 the claims reconciliation procedure -- the claims  
8 reconciliation process and we think that --

9 THE COURT: Well, but the premise underlying my  
10 question, and you can tell me whether you think that premise  
11 was well taken or not, was that there is at least seemingly  
12 a greater direct benefit in analyzing claims and trying to  
13 knock them down than some of the other things that you're  
14 trying to sell stock for.

15 MR. WILLIAMS: Look, claims reconciliation is a  
16 huge component of what we're trying to do, I certainly agree  
17 with that, but I don't think -- look, I mean if you were to  
18 ask the creditors' committee, you know, reporting and  
19 transfer, right, that was -- and again no one has objected  
20 to that, I think creditors have said that, you know, we're  
21 in favor of that. I think that that's very important.

22 Certain of these other things, you know, while  
23 they're not necessarily fun to talk about, like insurance or  
24 you know the insurance deductible or you know tax analysis,  
25 we're required to do that. Wilmington Trust is required to



1 do that.

2 And so, you know, from Wilmington Trust's  
3 perspective and from a liability perspective I would say  
4 that they're all important, certainly with respect to making  
5 the distributions to creditor, which, you know, originally  
6 one of the reasons we're over budget with respect to  
7 distributions itself was as it's initially been  
8 contemplated, and which we're hopefully going get there at  
9 some point soon, all distributions would be pushed out  
10 directly through DTC because we would have these  
11 transferable units and every unit would actually be in DTC  
12 land and we could sort of push it all out, but we're not  
13 there yet. And because of that, right, the budget initially  
14 contemplated that we'd be able to pass on most of these  
15 costs to the SEC.

16 The answer is we hasn't been able to do that.  
17 We've been spending, you know, time -- we and Gibson Dunn,  
18 some of my associates and we've been able to push off the  
19 work now, but you know, assisting creditors, you know,  
20 talking to them about getting their distributions, what  
21 forms you have to fill out, how you have to contact your  
22 brokers and the like, this all takes real time, and I don't  
23 think we can just say, you know, knocking out claims is the  
24 only thing that is important here. I think that it's all  
25 important and it's -- a lot of it to be frank just wasn't

1 anticipated and that's why we're here, Your Honor. And the  
2 GUC Trust administrator in its fiduciary capacity has  
3 determined that this motion makes sense, it doesn't make  
4 this motion lightly.

5 We -- as I said earlier, we had been pushing very  
6 hard to -- we were hoping we would never be in this  
7 situation, Your Honor, I think that's fair to say, but  
8 unfortunately we are, but we do think that this is going to  
9 be the best way to maximize value for creditors, and for  
10 that we would ask that your court -- that Your Honor grant  
11 the motion.

12 I'm happy to answer any other questions,  
13 Your Honor has.

14 THE COURT: No, you took care of them once we went  
15 along, Mr. Williams. Thank you.

16 MR. WILLIAMS: Thank you, Your Honor.

17 THE COURT: Who wants to be heard next?

18 Mr. Dublin?

19 MR. DUBLIN: Phil Dublin, Akin Gump Strauss Hauer  
20 & Feld truck on behalf of Green Hunt Wedlake.

21 Your Honor, Mr. Williams is correct that our  
22 objection has been resolved. We've had numerous --

23 THE COURT: It is correct?

24 MR. DUBLIN: He is correct, yes.

25 THE COURT: Okay.

1 MR. DUBLIN: That our objection has been resolved.

2 We had numerous conversations after the filing of  
3 our objection to get more information, which they then  
4 incorporated into the reply. They gave us some of that  
5 information in advance that we'd be able continue to due  
6 diligence leading up to the hopeful resolution.

7 I think it boils down to the fact of poor  
8 budgeting for the most part as to what happened here.  
9 People did not foresee what the aggregate costs were going  
10 to be for the trust and we know that there is work for that  
11 trust that needs to be done, work for the trust to do, and  
12 we believe that through modifying the reporting now with the  
13 6.2 reports as Mr. Williams referenced, that now the  
14 creditor body will have an opportunity to see on a quarterly  
15 basis the types of costs that are being incurred by the  
16 professionals and for the different types of services, and  
17 with that greater clarity we wouldn't be in a situation of  
18 surprise when a year goes by and you see the amounts that  
19 have been incurred and amounts that are projected there  
20 would be better controls for the world to understand what's  
21 happening in connection with this trust.

22 And hopefully as Mr. Williams mentioned this is  
23 more than sufficient enough value to take care of everything  
24 the trust needs to do, and if they have to come back asking  
25 for more later then we have our rights to challenge that as

1 well.

2 At that since we've resolved our objections I'm  
3 not going to go through each of your points unless there's  
4 anything specific you have for me, Your Honor.

5 THE COURT: All right, thank you.

6 Who's next? Mr. Jones?

7 MR. JONES: Thank you, Your Honor, David Jones for  
8 the U.S. Attorney's Office, and specifically actually I'm  
9 here today in my capacity as counsel for the U.S.'s  
10 unsecured creditor and specifically EPA.

11 I'll very briefly say that a lot of things were  
12 said about treasury department and its role in the budgeting  
13 process and in negotiations, and I simply am not in a  
14 position to comment knowledgeably or at least in depth on  
15 that. I do know that treasury at the time of confirmation  
16 accurately negotiated what it believed to be appropriate  
17 budgets going forward and what professionals agreed would be  
18 appropriate budgets going forward with an eye to meeting  
19 treasury's obligations to fund the wind down, yet at the  
20 same time not do so in a manner that would waste public  
21 resources unnecessarily.

22 So my understanding is the design of the plan and  
23 the relevant trusts is that they're to live within funding  
24 provided by treasury for that purpose, and to the extent  
25 that's not sufficient they need to eat into other sources of

1 funding, and the purpose of that structure is to encourage  
2 efficient discharge of the various responsibilities.

3 THE COURT: You're saying in substance that what  
4 they spend so long as it's not part of the treasury budget  
5 is their problem, but you're not taking the position on  
6 whether that's good or bad.

7 MR. JONES: Right. And Your Honor, I should say,  
8 I am -- and I hesitate to have -- I want to make clear the  
9 limits of my knowledge. I am going on my memory of events  
10 at the time of confirmation and my understanding of how that  
11 went, so I don't want to misspeak, but I, at the same time  
12 having heard a lot of things said about treasury, want to  
13 just put out that my, you know, imprecise and unrefreshed  
14 understanding is essentially that treasury wanted to impose  
15 cost discipline on this case going forward, that it was  
16 going to fund prospectively the remainder of the wind down  
17 but only up to justified levels that it committed to do  
18 that, it provided funding up to that level, and yes, that it  
19 did not want that to be a lax process or one without teeth.  
20 I'm not --

21 THE COURT: What you've just told me was the  
22 treasury perspective, now switch to the EPA perspective.

23 MR. JONES: Correct. And Your Honor, I want to be  
24 clear that for neither treasury nor for EPA nor any other  
25 governmental component are we taking any position on this

1 motion.

2 EPA of course is a very major unsecured creditor  
3 of the estate and so has a very substantial interest simply  
4 in appropriate cost controls and preservation of the corpus  
5 of assets that will ultimately be paid out to unsecured  
6 creditors in the estate.

7 Every single unsecured creditor in this case has  
8 its own unique and very great significance they attach to  
9 the payout in the case of EPA, critical public purposes are  
10 achieved through these payouts in the form of environmental  
11 remediation.

12 We did request from counsel for Wilmington Trust  
13 clarifications and additional information of the nature that  
14 they've discussed here today and that they also provided  
15 another party, and they did provide some clarifications and  
16 also an indication that they would be scaling back the scope  
17 of their request at the present time, and in part based on  
18 those discussions and based specifically on their assurance  
19 that the request sought would not cause any, as Your Honor  
20 said, discrimination issue, there will be not be a disparate  
21 payout rate for any creditors they assure us as a result of  
22 this motion we determined simply to take no position.

23 We have not undertaken a fly specking of their  
24 budgets and their cash burn rates and everything else that's  
25 being -- that gives rise to the situation that's before the

1 Court today, so we're -- I mean, I'll say it again, so we  
2 are neither affirmatively consenting nor affirmatively  
3 objecting.

4 We do want to note that any incursions into the  
5 corpus, into the assets available for unsecured creditors is  
6 of very great concern to the government as unsecured  
7 creditor and I know it is as to the entire creditor body,  
8 and for that reason we want to express and put on the record  
9 our hope that there will be no further asset sales required  
10 or sought in the future, that the professionals will  
11 redouble their efforts to live within the budget as set  
12 forth, and that this case can proceed as efficiently and  
13 cost effectively as possible.

14 That's really the full extent of what I have to  
15 say, Your Honor, and if the Court has no questions --

16 THE COURT: Okay.

17 MR. JONES: -- then I'll sit. Thank you.

18 THE COURT: Others? Mr. Zirinsky and Ms. Leary.

19 MS. LEARY: Your Honor, good morning, Maureen  
20 Leary for the State of New York and New York Attorney  
21 General's Office.

22 New York was actually heartened to see in the  
23 reply a lot of the information that was provided in the  
24 three affidavits.

25 There are a couple of small points I'd like to

1 make.

2 We were pleased that the no action funding and the  
3 future tax liability funding requests were withdrawn. I  
4 don't necessarily believe that the trust concurred that  
5 those matters were not ripe as we asserted, but it's  
6 academic. I still believe that there are some matters here  
7 that may still not be ripe, and Your Honor referred to the  
8 2012/2014 budget.

9 THE COURT: You said 2020 -- 2012 to 2014,  
10 Ms. Leary, but if I heard it right they're only looking for  
11 2011 and 2012 at this point.

12 MS. LEARY: I think that's right, but I think the  
13 reserve is still being requested; is that correct? So the  
14 money would be available for liquidation any way?

15 THE COURT: Do you mind yielding to him to answer  
16 your question, Ms. Leary?

17 MS. LEARY: Not at all.

18 MR. WILLIAMS: I'm just not sure I understand the  
19 question.

20 The reserve being the -- we've -- Your Honor, as I  
21 stated earlier, we've reserved stock for 2013 and 2014,  
22 we're not seeking to sell that at this time, the initial  
23 motion didn't seek to --

24 THE COURT: So if the stock isn't being sold can I  
25 properly assume -- both parties, first you, Mr. Williams and



1 Ms. Leary -- that that aspect is no harm no foul at this  
2 juncture?

3 MR. WILLIAMS: I believe so, Your Honor, yes. And  
4 again, for the reasons I stated earlier we don't know if  
5 it's going to be adequate or unnecessary based upon our  
6 initial budgeting, we think we're going to need it, but  
7 given 2013 is so far away and given all the uncertainties  
8 we've seen in this case to date we're not seeking to sell it  
9 at this time.

10 THE COURT: Well, if you're not seeking to sell it  
11 that's obviously helpful, but is the purpose of -- what then  
12 is the purpose of reserving it? So you don't have to come  
13 back to me?

14 MR. WILLIAMS: No, we would still have to come  
15 back to you, Your Honor. The way the GUC Trust agreement  
16 works is that we're entitled to reserve it to the extent  
17 that we think we're going to be over. We don't have to sell  
18 it yet.

19 The issue is that if we don't reserve it now the  
20 GUC Trust has a very set formula, and if it's not set aside  
21 in the reserve it gets pushed out to unsecured creditors on  
22 a quarterly basis.

23 And so the concern is that if we push out that  
24 stock that we think we're going to need for 2013 and 2014  
25 we're not going to have it to sell at that point. So right

1 now we've just put it in a lock box.

2 THE COURT: Forgive me, I think you've said this,  
3 but it's important.

4 MR. WILLIAMS: Sure.

5 THE COURT: So under the reserve concept the stock  
6 wouldn't be sold, but it wouldn't be considered to be -- the  
7 value of the reserve would not be considered available for  
8 distribution in the next wave to the unsecured creditor  
9 community.

10 MR. WILLIAMS: That's correct, Your Honor.

11 THE COURT: All right. Back to Ms. Leary, please.

12 MS. LEARY: And so the reserve concept, I want to  
13 direct the Court to Ms. Phillips' affidavit, and I believe  
14 it's paragraph 13 in which she states, "It is clear that  
15 there will be substantial overruns based on future  
16 projections."

17 So the reserve, whether it's liquidated or not,  
18 it's still not going to be available to the creditors, so we  
19 still have concern about that.

20 And just to sort of make a finer point here, I  
21 believe in the claims resolution process once claims are  
22 disallowed that amount of stock is then freed up and  
23 available to the GUC Trust if it chooses to come back to the  
24 Court and see a reservation.

25 So I don't really think that this money going out

1 as a reserve is going to result in them not having any  
2 available assets. But let me -- let me just broaden this.

3 THE COURT: You mean to distribute to the  
4 unsecured creditor community who's got all fully allowed  
5 claims?

6 MS. LEARY: That's correct.

7 So there's a question in my mind about whether  
8 there is still ripeness on that future projected substantial  
9 as referred to by Ms. Phillips, overruns, that are  
10 anticipated. Because as far as I'm concerned that money is  
11 reserved and liquidated whether they have to come back to  
12 the Court or not, there's not going to be much anybody in my  
13 view will be able to say about it. Maybe they will, but I  
14 certainly don't want to come back.

15 As Mr. Jones eluded to, my purpose is to assure  
16 that all creditors are treated equally within not just this  
17 small box of pro rata sharing in the reserves that  
18 Your Honor ordered -- and I'm speaking about a different  
19 reserve now -- you entered an order that set reserves for  
20 each of the allowed -- the disputed not allowed claims  
21 before confirmation.

22 And what is troubling in -- and it may be my own  
23 misunderstanding or some semantical issue -- what's  
24 troubling in the GUC Trust motion is their reference to --  
25 in response to New York's concern about discrimination --

1 which I understand Your Honor doesn't see -- but their  
2 statement is that all creditors share pro rata in the  
3 reserve, and I view that as different than sharing pro rata  
4 in the entire corpus of the trust. Maybe there's no  
5 difference, but what I expected in response to our objection  
6 on discrimination isn't a statement that it won't result in  
7 undue harm, I expected a statement consistent with the GUC  
8 Trust that this liquidation of assets and future  
9 liquidations will not unfairly discriminate against any  
10 creditor whether it's Wilmington Trust down to the smallest  
11 of creditors. That's the statement that's missing from the  
12 papers.

13 Even though I feel that the reply gave a lot of  
14 information, there's still this one piece that perhaps  
15 Mr. Williams can clarify, and maybe I'm reading too much  
16 into the difference between sharing and pro rata in this  
17 reserve, which I view as differently than the corpus of the  
18 trust.

19 THE COURT: I'll tell you now, Ms. Leary, I'm  
20 going need help either from you or Mr. Williams in  
21 understanding that issue. Because I thought that for those  
22 who have heretofore unallowed claims, claims that were  
23 disputed but not ruled on, you're fully reserved, and I'm  
24 not clear on whether you're trying to protect your interest  
25 in the subset of your claims that's in this category or the

1 subset of your claims that have been fully allowed, because  
2 it's my impression you've got claims in each category.

3 MS. LEARY: That's right. And I would suggest,  
4 Your Honor, that we're trying to protect both. We're trying  
5 to protect both our position as an allowed claimant and our  
6 position as still holding unresolved claims.

7 THE COURT: And in your disallowed category -- or  
8 not disallowed because they haven't been disallowed --  
9 you're not yet allowed category --

10 MS. LEARY: Correct.

11 THE COURT: -- or your unallowed category -- maybe  
12 they'll be allowed and maybe they won't -- I -- it's my  
13 understanding subject to your rights to convince me  
14 otherwise that you're fully reserved and protected on that  
15 and that your contention, if any, is as the -- one of the  
16 relatively few in the unsecured creditor community who  
17 thinks that there's an inequality issue there because I'm  
18 having more trouble seeing that.

19 MS. LEARY: Well, you know, in all honesty, I  
20 don't -- I can't tell. I cannot tell whether at the end of  
21 the day Wilmington Trust, who got the initial distribution,  
22 is going to have been treated differently than New York  
23 State or any other creditor that is allowed later.

24 THE COURT: You got your piece of the action on  
25 the initial distributions --

1 MS. LEARY: No.

2 THE COURT: -- up to this point.

3 MS. LEARY: No.

4 THE COURT: On your allowed claims?

5 MS. LEARY: No. We were -- we were not given a  
6 distribution until a month ago and that was the first  
7 distribution we received, I believe it was the 3rd. We  
8 had --

9 THE COURT: Is that because of a delay in getting  
10 your claims allowed or because they were mean to you back  
11 when you had allowed claims and didn't get distributions on  
12 the original effective date?

13 MS. LEARY: I'm going to have to plead the Fifth  
14 on that, but as I think I set forth in either these papers  
15 or the ones on the motion you're going to consider on  
16 March 1st, New York had a deal on its -- on those claims  
17 that have since been allowed in March, and it was before  
18 confirmation I believe.

19 THE COURT: March of 2012?

20 MS. LEARY: '11.

21 THE COURT: '11.

22 MS. LEARY: Yes. In March 2011. And it did not  
23 -- we did not receive a distribution until January of 2012.  
24 We had a stipulation I believe in June, that took -- I mean  
25 there was in my view some -- I chalked it up to up and

1 running kind of trying to figure things out, the GUC was --  
2 GUC Trust was mixed up with many, many different issues and  
3 so forth, but I don't know why it took that long. I know  
4 that I had some correspondence with the GUC Trust in which I  
5 emailed and telephoned, and I'm not getting a whole lot of  
6 feedback frankly, but you know, those issues are not before  
7 the Court. We did not participate in the initial  
8 distribution that Wilmington Trust got, the 150 million  
9 shares I believe it was.

10 So at the end of the day I don't know. I -- and  
11 that's why I'm here, I don't know. And each time there is  
12 an erosion of the corpus of the trust through liquidation  
13 and payment of professionals that reduces the recovery that  
14 New York will receive in either position that it holds I  
15 believe, because it -- New York believes it shares in the  
16 entire corpus equitably with the other creditors, and I  
17 believe that's what the GUC Trust says, that's what  
18 Your Honor said in confirming this plan. But the question  
19 really is at the end of the day is that actually what  
20 happened?

21 So my expectation in these rely papers was that  
22 Mr. Williams -- the GUC Trust would come back and say not,  
23 you won't be unduly harmed, they would come back and say,  
24 no, we have this issue addressed. You will not be  
25 discriminated, you will be treated the same whether you're

1 allowed on day one, as Wilmington Trust was as the initial  
2 recipient of the initial distribution, as on day whatever  
3 the end date is.

4 THE COURT: However I had understood when I issued  
5 my ruling that day one is the day that your claim is allowed  
6 or the effective date of the plan, whichever comes later --

7 MS. LEARY: That's right.

8 THE COURT: -- but day one -- if there was a delay  
9 in your claim being allowed --

10 MS. LEARY: I still get treated the same as day  
11 one.

12 THE COURT: -- but that it would be measured by  
13 the time -- well, day one was the date your claim was  
14 allowed even though that's after the effective date.

15 MS. LEARY: I may have misunderstood you,  
16 Your Honor, but are you saying that under your order New  
17 York gets treated or any creditor gets treated the same no  
18 matter when their claim is allowed? Because I believe  
19 that's expressed in your order. Regardless of when my claim  
20 becomes --

21 THE COURT: You get X shares of stock then without  
22 a true up on account of market movements.

23 MS. LEARY: That's correct, we do not get the true  
24 up on account of whether the stock is trading on the day I  
25 get distribution at 19 or 35.



1 THE COURT: So unless they pocket vetoed you on  
2 distributions after your claim would be allowed I don't see  
3 a prejudice to you.

4 MS. LEARY: Well, Your Honor, I hope -- I hope so.  
5 I did have an expectation that the GUC Trust would come back  
6 and make that statement, not the statement of undue harm,  
7 which implies some harm, it's just not undue.

8 You know, I also want to address a couple of other  
9 issues primarily on the professional fees.

10 You know, I think the Vinasky, Phillips, and  
11 Marrow (ph) affidavit were certainly -- went further in  
12 providing information to creditors about how everything  
13 works behind this black curtain, and as set forth in our  
14 objection, our limited objection, there's no question that  
15 professionals have to be paid. The administrator has to be  
16 paid. The monitor should be paid. No question in our mind.

17 The only question is, is what are the controls?  
18 And the thing missing from these papers is the criteria that  
19 is applied in terms of determining reasonableness. Love the  
20 layers.

21 What's the criteria? Are they applying this  
22 Court's rulings, the law of this case that you spent -- not  
23 hours -- weeks, months with the fee examiner talking about?  
24 Is it inconsistent -- is it consistent or inconsistent with  
25 U.S. Trustee's guidelines? What is the story on the

1 criteria being applied?

2 THE COURT: Well, I'm not aware that the U.S.  
3 Trustee guidelines either present or proposed have any  
4 relation to this issue.

5 MS. LEARY: Well, I think there has to be some  
6 criteria, and that criteria has to be disclosed to the  
7 creditors who are the beneficiaries.

8 And the important thing that I believe is worth  
9 noting is the GUC Trust views this 10 percent hold back as  
10 some time of a penalty. That money gets paid. It may be a  
11 hold back, but it's not available to the creditors.

12 So there's no incentive here to stay within  
13 budget. All there's an incentive to do is say, well, can we  
14 live with that 10 percent until the end of the case? We're  
15 going to get paid, but -- so that's no penalty in my view.

16 And I think it would be easy for this Court to  
17 impose some criteria to ask the GUC Trust to disclose to --  
18 this is the criteria on which we will judge reasonableness.  
19 And I think this Court has spoken as has the fee examiner in  
20 this case or numerous occasions about that issue.

21 THE COURT: Okay. Now you hit on one of the  
22 things I was about to ask you about, Ms. Leary.

23 After they gave you the clarifying information and  
24 the three new affidavits what issues do I have left from  
25 your perspective other than the need to announce the

1 criteria for payment?

2 MS. LEARY: Well, I think -- I think that the  
3 Court should look again at this question of ripeness of the  
4 2012/2014 budget, and I think Ms. Phillips is the -- you  
5 know, probably the best source of why that -- the Court  
6 should look at that more closely in terms of her statement  
7 that there will be future projected overruns and they will  
8 be substantial.

9 And other than that, Your Honor, I hope that -- my  
10 hope for all the creditors in the pool is that there be  
11 greater transparency, and I think that that is going to be  
12 helped by the settlement that was reached to one of the  
13 objections that requires a little bit additional disclosure  
14 under 6.2.

15 Other than that, Your Honor, if you don't have any  
16 other questions I -- I have nothing further.

17 THE COURT: Okay. Thank you.

18 MS. LEARY: Thank you.

19 THE COURT: Mr. Zirinsky?

20 MR. WILLIAMS: Thank you, Your Honor.

21 (Pause)

22 MR. ZIRINSKY: Thank you, Your Honor. I will try  
23 to be brief.

24 I think like Your Honor our reaction when we saw  
25 -- our client's reaction when we saw the initial motion was

1 people were basically astounded at the dramatic increase in  
2 the projected budget for 2012. This was a budget that was  
3 put together and submitted and represented to the Court and  
4 to the creditors through the disclosure statement only nine  
5 months earlier before the end of March 2011.

6 And so the initial question was, well, how could  
7 they have underestimated by such a large amount? Basically  
8 for 2012 it's almost a 70 percent increase from what their  
9 budget was -- their original budget was and what they're now  
10 asking for.

11 And we understand that the people who were  
12 involved in preparing that initial budget had to negotiate  
13 with the U.S. Treasury, the DIP lender, other parties, but  
14 they were also the parties who were in the best position to  
15 know what the cost would likely be.

16 You have the former chairperson of the creditors'  
17 committee who is now Wilmington Trust as the GUC and the  
18 Avoidance Action Trustee, and FTI, which is the monitor for  
19 both of those trusts. My understanding was they were the  
20 financial advisor or one of the financial advisors for the  
21 creditors' committee.

22 So these people didn't come in as babes in the  
23 wood not understanding the terrain and what the future tasks  
24 were likely to be.

25 Having said that we're not suggesting that they be

1 starved and that they shouldn't get a penny more, that's not  
2 our issue. Moreover, we are pleased that in the reply we  
3 did get a lot more information than we had in the original  
4 motion, which at least explains where the areas with more  
5 specificity where the areas of increase were likely to be.

6 What we don't really have is an explanation as to  
7 how they arrive at these numbers and whether they're  
8 reasonable in terms of the -- basically the potential  
9 benefits to the creditors through the expenditure of these  
10 additional monies.

11 But that's really a transparency issue, and I  
12 think that what we're really concerned about is not so much  
13 that there's a prospect of higher costs, but how are we  
14 going to control those costs going forward?

15 And there's been a lot said by the trustee in its  
16 papers regarding this very precise process or strict process  
17 of budgeting and living up to budgets, and the U.S.  
18 Treasury, the DIP lender examining all of the expenses  
19 before they're paid. But I think what's also clear is that  
20 U.S. Treasury is concerned about its money not being spent  
21 beyond what it's approved in its budget.

22 I don't think it's reasonable to expect the U.S.  
23 Treasury once the amounts being requested are in excess of  
24 the budget that they're going to pay and now it's going to  
25 come out of the creditors' money to fund the excess. It's

1 not fair to say that the people who are spending the money  
2 and the people who are receiving the increased -- the  
3 benefit of these increases are the sole judges or should be  
4 the sole judges of what's reasonable.

5 Put another way, the people who really have a  
6 financial stake in the GUC Trust and the other trust  
7 potentially are not represented in any fashion in terms of  
8 the budgeting process. We get information after the fact.

9 And what I would suggest, and I don't have a  
10 proposal for Your Honor, but what I would suggest is that  
11 there needs to be an independent party. I mean I understand  
12 the skepticism that we're an adversary right now on our  
13 disputed claim so it certainly shouldn't be us, and we're  
14 not proposing that it be us, but there should be somebody  
15 who the Court is comfortable with who has an ability not  
16 just to complain after the fact, after the money has been  
17 spent and they come back next year and say, well, you know,  
18 last year the budget was this and now we've anticipated  
19 we're going to have another 50 percent increase in expenses  
20 because of all of these unforeseen things. We need somebody  
21 who's there and can see the money being spent or how the  
22 decisions are made.

23 THE COURT: Who'll work for free, Mr. Zirinsky?  
24 Because I could swear that one of the entities that is on  
25 the list of the people who the unsecureds are paying for --

1 MR. ZIRINSKY: Is the monitor.

2 THE COURT: -- is the fee examiner's own law firm.  
3 Isn't that part of my problem that every time I put somebody  
4 new in the process I've got --

5 MR. ZIRINSKY: It's another expense layer.

6 THE COURT: -- Wilmington Trust, FTI, they're not  
7 only not working for free but they're contributing to the  
8 overruns that I'm dealing with?

9 MR. ZIRINSKY: That's the dilemma. And what I'm  
10 -- I mean I'd happy to hear about the partial -- what I  
11 consider to be a partial resolution as we'll get more  
12 information on a quarterly basis, that's good, okay, I'm  
13 happy with that, but the question is what's the control  
14 mechanism to make sure that what -- that if the money is not  
15 -- how do we assure that the money is being well spent?  
16 It's in the budget, yes, we'll be able to track and see  
17 whether or not they've spent more than they were supposed to  
18 spend, but how do we determine whether or not at the end of  
19 the day the money has been well spent?

20 And secondly, how do we determine or get  
21 comfortable that the same people who gave us a projection  
22 that's off by 70 percent nine months later for 2012, how do  
23 we have confidence that they're projection for 2012 and  
24 potentially years beyond 2012, how do we have confidence  
25 that those are good projections?

1 I understand their projections and there are no  
2 guarantees on projections, but I think anyone in this room  
3 would concede that a 70 percent variance in nine months from  
4 a budget estimate is extraordinary.

5 And we're not here to, you know, fall on our  
6 swords over this, we're not here because we're -- you know,  
7 we -- you know, we don't like them because they're  
8 litigating with us over their claims, we're here because at  
9 the end of the day we have confidence that we are going to  
10 have allowed claims, and we, like every other creditor, has  
11 an interest in making sure that whatever money needs to be  
12 spent to maximize creditor recoveries is being spent wisely,  
13 and it's as simple as that.

14 And we haven't had an opportunity to meet with the  
15 trustee or its counsel. We were not in part of the  
16 dialogue. There may be, and I don't think that the Court  
17 wants to take the rest of the day dealing with this, but I  
18 think there may be an opportunity or benefit if we could  
19 have a recess or an adjournment of this so we can have an  
20 opportunity to talk to Gibson Dunn and their clients and see  
21 if there's an ability to come up with some mechanism that's  
22 not going to add another substantial layer of cost, but some  
23 additional mechanism that will give creditors comfort that  
24 money -- the money spending decisions are being done wisely  
25 and that the costs are reasonable.



1 I mean one example, Your Honor, is the 13 some  
2 million dollars that's being proposed to be put from these  
3 proceeds into the Avoidance Action Trust. There's a dispute  
4 -- it's on appeal now I understand -- but there's a dispute  
5 as to who's the beneficiary of any recovery under that  
6 action.

7 So the papers filed -- I mean reply filed by  
8 Wilmington Trust says, well, you know, the potential  
9 recovery is a billion and a half dollars, and what's 13 and  
10 a half million dollars, it's a very small minuscule  
11 percentage of that. Well that's one way to look at it, but  
12 it's also 13 and a half million dollars of money coming  
13 that's being funded by the unsecured creditors.

14 We have no idea what happens if the appeal -- if  
15 it turns out that the unsecured creditors are not entitled  
16 to the benefits of that avoidance action. We have no basis  
17 -- understanding one way or another as to what the potential  
18 likelihood of success is on that litigation.

19 We're not looking for trade secrets, we're not  
20 looking to invade confidential information, but we don't  
21 have any sense at all as to if the recovery is going to be  
22 made ultimately for the benefit of the DIP lenders then it  
23 should be the DIP lenders what are potentially funding that  
24 litigation. If there is a recovery that's going to be made  
25 as Your Honor noted earlier in the hearing, there's a

1 potential billion and a half dollars of additional unsecured  
2 claims, so we could have the terrible result where they  
3 actually win the litigation on that avoidance action, they  
4 create an unsecured claim for a billion and a half dollars,  
5 they recover assets, and the benefit of that recovery  
6 doesn't go to the unsecured creditors, and the unsecured  
7 creditors paid for all of that.

8 THE COURT: Would your argument be the same or  
9 different if I told you that I thought that under -- in the  
10 spectrum of issues that I decide, some I think are close and  
11 some aren't that close, and I'm really pretty damn sure that  
12 I got it right on that last one.

13 (Laughter)

14 MR. ZIRINSKY: I have no doubt.

15 THE COURT: I'm sure Mr. Jones ain't going like  
16 that, but I mean that's what his rights are in the appellate  
17 system.

18 MR. ZIRINSKY: Well, that may be the answer, but  
19 you know, until you just said that I don't know. I mean I  
20 obviously haven't read every paper or attended every hearing  
21 in this case.

22 THE COURT: Unfortunately on the underlying issue  
23 my opinion no longer matters because I issued a judgment.

24 MR. ZIRINSKY: I understand that.

25 THE COURT: But I'm now asked to make

1 discretionary calls based upon my estimate of the  
2 probability of a reversal, and I think that if I'm allowed  
3 to exercise my discretion I don't weigh the probability of a  
4 reversal very highly.

5 MR. ZIRINSKY: And that's all to the good,  
6 Your Honor.

7 My only point is that there needs to be some  
8 dialogue in terms of explaining that to people, because I  
9 frankly did not glean that from the papers and their request  
10 for take 13 and a half million dollars and put it in another  
11 trust without having any knowledge as to what evaluation the  
12 trust has made in terms of the cost benefit analysis other  
13 than to say it's only a small percentage -- very minuscule  
14 percentage of the potential recovery. I agree with that,  
15 but it's also 13 and a half million dollars which is a lot  
16 of money.

17 So having said that, Your Honor, I don't want to  
18 take up more of your time. I do think that it would be  
19 helpful to have some additional dialogue to see if there's  
20 some reasonable way to impose some discipline -- I have the  
21 complete confidence in the U.S. Treasury to watch its money  
22 on the portion of the budget that it's going to be -- that  
23 it's funding, okay? I have less confidence in them -- I  
24 love my country and I love my government -- but I have less  
25 confidence in them to be as careful when it's no longer

1 their money being spent but it's the unsecured creditor's  
2 money being spend.

3 I don't think to be fair at the time of the  
4 confirmation of the plan, I think the message we heard was  
5 that we have this mechanism to sell securities as a safety  
6 valve, that in the event the trust ran into a problem and  
7 there was a short fall there'd be an ability to access some  
8 of the money subject to Court approval. What I don't think  
9 was -- and I agree with that.

10 What I don't think was contemplated was that this  
11 was part of the deal and that therefore in terms of  
12 evaluating how they're going to pay their expenses going  
13 forward they could assume that they had access to the  
14 reserve securities in order to fund whatever additional  
15 expenses they thought might be reasonable in the future.

16 I think it -- there's a real difference in that in  
17 terms of -- and I think Your Honor eluded to that in your  
18 opening comments on this matter -- that I sat in the  
19 confirmation hearing, I heard the same thing Your Honor  
20 heard. I heard that there was going to be strict adherence  
21 to a budget, and said fine, we didn't object by the way, we  
22 didn't object to that -- to that issue at all. We objected  
23 to others and Your Honor dealt with them. But we were  
24 satisfied with that. But it was not our understanding that  
25 what was viewed as a safety valve was going to be viewed as

1 an open faucet for more money just to come in whenever they  
2 had a need for it and a desire to spend it.

3 So I do think that it's good to have -- it's good  
4 to have some mechanism where the unsecured creditors who are  
5 the potential beneficiaries of all of this and are also  
6 going to be funding the bill for these excess costs have  
7 some person other than parties who are recipients of these  
8 monies and these expenditures to be able to be comfortable  
9 that the money is being wisely spent.

10 Thank you.

11 THE COURT: All right, thank you.

12 Mr. Williams, I'll take reply.

13 MR. WILLIAMS: Thank you, Your Honor, I'll be  
14 brief.

15 With respect to the question that New York State  
16 had about the reserve, this is not coming out of the  
17 reserve. We don't view this as -- you know, I mentioned to  
18 Ms. Leary that I would make the statement that from our  
19 perspective, you know, this is -- the stock that's being  
20 sold was defined as excess GUC Trust distributable assets.  
21 A lot of definitions in this trust agreement. But the  
22 excess GUC Trust distributable assets had we not sold them  
23 they would have been distributed out to unsecured creditors.

24 The reserve is what it is, and at the time when  
25 the claim is allowed they'll be entitled to the same pro

1 rata distribution that allowed claim holders get.

2 I would note that Ms. -- the State of New York's  
3 claim when it was allowed it was paid in the next quarterly  
4 distribution. There were apparently some hold ups with the  
5 allowance of the claim. It wasn't a distribution mechanic,  
6 right, the GUC Trust makes quarterly distributions, and she  
7 was -- and New York State got its distribution in the next  
8 quarterly distribution. There wasn't any issue with the  
9 trust. The trust has been pushing out distributions very  
10 efficiently, Your Honor.

11 With respect to the -- there were some references  
12 to the Anna Phillips declaration about substantial overruns  
13 and how it's a real issue. We agree it's a real issue,  
14 which is why we're making this motion. The substantial  
15 overruns that she references are overruns for 2012.

16 And as Your Honor mentioned earlier, the vast  
17 majority of this is for claims reconciliation. If you look  
18 at the 2012 budget or the revised budget the vast majority  
19 of it for claims reconciliation. And the truth is, there  
20 are still a lot of claims to do. The initial budget had  
21 contemplated that by now we'd be through all of the -- or  
22 through a lot of the claims, and the truth is we still have  
23 a lot more claims to do. And as I said earlier to the  
24 extent Your Honor wants an update on the claims  
25 reconciliation process we can give you one.

1 With respect to this issue about, you know,  
2 another layer of some sort of professional monitor on top of  
3 the monitor, I've got real concerns about that for a couple  
4 of reasons.

5 One is, you know, we filed this motion -- this  
6 filed was filed 35 days ago, right, so you know, the idea  
7 that we're going to work out some sort of a new mechanism  
8 where we're going to have a monitor or a trustee or  
9 something to sit on top of the monitor to review the  
10 monitor's fees who reviews the professional's fees, it's --  
11 and who's going to monitor that monitor's fee? At some  
12 point we have to stop this.

13 And the truth is there is somebody reviewing the  
14 fees here, right, in addition to treasury, and it's both  
15 Ms. Phillips' firm, FTI, and Wilmington Trust, they review  
16 it for reasonableness. That's part of their job and they've  
17 been doing that.

18 And you know, right, the idea that we need some  
19 sort of standard to do that, you know, Mr. Vinasky -- you  
20 know, Wilmington Trust hires professionals all the time,  
21 they know better than anybody, probably better than a lot of  
22 the lawyers what a good fee statement looks like and what's  
23 getting done and what's not.

24 So I don't think we want to hire yet another  
25 professional and then at some point if someone is unhappy

1 with their fees that we're going to have to hire a  
2 professional to oversee that professional. Doesn't make a  
3 lot of sense to me, and I think that we've already got  
4 enough oversight here.

5 And at the end of the day even if there isn't --  
6 as I said earlier, Judge, this has been noticed up to all  
7 creditors, so every creditor has an opportunity to look at  
8 this motion and figure out, you know what, you know, based  
9 upon this and the benefit that I'm getting and the  
10 distributions that I've been getting from the trust on a  
11 quarter basis -- we've made a distribution I think on every  
12 quarter except for one so far -- and the reason we didn't  
13 make a distribution for the one quarter is because we didn't  
14 have enough excess GUC Trust distributable assets, there's a  
15 minimum threshold so we didn't make a distribution that  
16 quarter. I think that the creditors think that the GUC  
17 Trust is doing a pretty good job here and I don't think that  
18 we need -- the mere fact that it turned out that the initial  
19 budget negotiated with treasury wasn't enough isn't --  
20 doesn't make it necessary to hire yet another professional  
21 because it's just going to be another layer of expense.

22 Unless Your Honor has any other questions I don't  
23 have anything else to say, Your Honor.

24 THE COURT: Okay. Here's what we're going to do.  
25 It appears to me that the principal issues remaining after



1 what we've heard today, and especially what we got in the  
2 way of the three clarifying affidavits, are ripeness going  
3 forward, and I forgot the exact words Mr. Zirinsky, but it  
4 was roughly how we control cost going forward, and matters  
5 of transparency.

6 I think his idea of there being a caucus amongst  
7 the movants and the remaining objectors had some merit, and  
8 I would need time to dictate a decision in any event.

9 So here's what I want to do. Mr. William, I want  
10 you and anybody who's giving you direction or guidance to  
11 put your noodles together with Mr. Zirinsky and Ms. Leary on  
12 the matter of future control of cost and transparency over  
13 the lunch break while I'm blocking out thoughts to dictate a  
14 decision. Hopefully if your discussions are productive they  
15 will make some of the issues that I would otherwise need to  
16 decide go away.

17 As a preview of my decision that would be coming  
18 out at the end I think that concerns for 2011 have largely  
19 been addressed -- maybe I should say at least largely  
20 addressed giving myself that much wiggle move -- save and  
21 except only for one area where I might need extra  
22 information unless you can give it to me right now, as to  
23 the extent to which I've got a request for 2011 compensation  
24 above the 100,000 a month, and maybe you can tell me now  
25 whether we're talking about something material or whether

1 it's de minimis in the context of the total request.

2 My main concern is getting a protocol for deciding  
3 if I have to have it litigated or having comfort that it's  
4 going to be resolved, how we're going to avoid problems  
5 going forward in 2012.

6 And you're to caucus with them maybe over soup or  
7 sandwiches to see if you can make some issues or  
8 recommendation to me that gives me something that people are  
9 comfortable with.

10 I don't want to play a venging angel here if there  
11 are no objections, but I do need to have comfort that the  
12 unsecured creditors are going to be as protected as well as  
13 the government is in 2012 and thereafter.

14 So my recommendation, it's 1 o'clock, is that we  
15 reconvene at 2:15, at which time or as quickly thereafter as  
16 I can I'll dictate something, but hopefully you'll give me a  
17 lesser number of areas upon which I have to dictate a  
18 litigated decision. Okay?

19 So we're in recess.

20 Oh, before we do, Mr. Williams, can you answer the  
21 question that I articulated in the remarks I just made? How  
22 much are we talking about that your client wants above  
23 100,000 a month?

24 MR. WILLIAMS: For 2011 none.

25 THE COURT: For 2011 none at all?

1 MR. WILLIAMS: None at all.

2 THE COURT: Okay.

3 MR. WILLIAMS: For 2011 the issue was, you know,  
4 011 ended and we said, you know, we're seeking it for 012  
5 going forward, but for 011 none.

6 THE COURT: Okay, that's helpful.

7 All right, we're in recess.

8 MR. WILLIAMS: Thank you, Your Honor.

9 (Recess at 1:00 p.m.)

10 THE CLERK: All rise.

11 THE COURT: Have seats, please.

12 Okay, before I rule are there any understandings  
13 that you folks have to report to me?

14 MR. WILLIAMS: Yes, Your Honor, if I may.

15 THE COURT: Come on over to the microphone,  
16 please, Mr. Williams.

17 MR. WILLIAMS: Good afternoon, Your Honor, Matthew  
18 William, Gibson, Dunn & Crutcher for Wilmington Trust as the  
19 GUC Trust administrator and GUC Trust monitor.

20 I'm happy to report to Your Honor that I think we  
21 had very productive discussions during the lunch break. I  
22 think we've reached a deal in principal with both the Nova  
23 Scotia creditors as well as the State of New York, and I was  
24 going to let Your Honor knows the terms of that arrangement  
25 and answer any questions that Your Honor may have.

1 THE COURT: Why don't you go ahead and do that and  
2 then I'll give Mr. Zirinsky and Ms. Leary a chance to  
3 comment.

4 MR. WILLIAMS: Okay, thank you, Your Honor.

5 As I mentioned earlier I just wanted to clarify  
6 again for the Court that with respect to the initial relief  
7 that we had sought on the \$17 million worth of stock the  
8 transfer to the Avoidance Action Trust to fund a potential  
9 tax issue we're no longer seeking that relief.

10 For the 2012 budget what the parties agreed to  
11 would be that it would in essence be a hard cap based upon  
12 what's in the current -- based upon a proposal that we made  
13 to the Court, and it would be I guess their budget attached  
14 to Exhibit B to the Vinasky declaration, which you know, has  
15 the line items, we'll file that with the 6.2 reports on a  
16 quarterly basis.

17 The hard cap for 2012, to the extent that the  
18 professionals go over the hard cap professionals are just  
19 going to have to share the pain. There's not going to be  
20 another request to the Court for 2012 to sell more stock to  
21 fund professional fees.

22 But that being said, the budget is not going to be  
23 line item constrained as it is currently with respect to the  
24 treasury budget. So to the extent there's an overage for  
25 one professional and an underage in another, you know, you

1 can move around the line items, but there's going to be a  
2 hard cap, there's no more stock sales in 012, Your Honor.

3 In connection with the -- in 2013 -- for the 2013  
4 budget, we, the GUC Trust administrator, we're required to  
5 provide that to the DIP lenders in November of 2012. We'll  
6 be providing that to any other parties that, you know, ask  
7 for it, among others. We understand that the New York State  
8 as well as Mr. Zirinsky's clients have already asked for  
9 that so we'll be providing that to them at the same time we  
10 provide it to treasury.

11 And finally, to the extent that we are going to  
12 make a motion, if we are in 2013 to sell anymore stock to  
13 fund expenses for 2013 we would meet and confer with the  
14 objecting parties before we made any such motion.

15 THE COURT: The parties who have objected on this  
16 one?

17 MR. WILLIAMS: That's correct, Your Honor.

18 THE COURT: Okay.

19 Okay, Mr. Zirinsky, Ms. Leary, you want to be  
20 heard?

21 MR. ZIRINSKY: Your Honor, I think that  
22 Mr. Williams has accurately set forth the understandings we  
23 reached over the lunch break.

24 You know, I just want to reiterate and I think  
25 this was very helpful for me to hear, and one of my clients

1 is here today, Morgan Stanley, was helpful for us to hear  
2 directly from Wilmington Trust and FTI some of the efforts  
3 that they have been making to try to control the expenses as  
4 well as the efforts that they have assured us they will  
5 continue to make and that will, you know, basically be, you  
6 know, a hard and fast budget, and if a professional is going  
7 over the budget too bad.

8 It's not going to be line item, but to the extent  
9 that the overall cap is being reached or breached it's not  
10 like the lawyers or the other professionals will stop  
11 working, they will be required to continue to work, but in  
12 some equitable fashion we'll leave it up to them, they're  
13 going to have to share the pain because there will not be  
14 any additional money and there won't be any money funding in  
15 2013 to cover deficiencies in 2012.

16 This is a hard cap, full stop, and this is the  
17 budget they've asked for and they've agreed that they will  
18 live within the confines of this budget.

19 And with that, I mean we're not 100 percent happy,  
20 but we think that's a fair resolution.

21 THE COURT: Uh-huh.

22 Ms. Leary?

23 MS. LEARY: Thank you, Your Honor.

24 One of the benefits of this discussion I want to  
25 be perfectly frank with you that -- was that we really did

1 get to see firsthand some of the things that both FTI and  
2 Wilmington are doing, and I have a greater level of  
3 confidence that I think the future will be better.

4 And I know this first year must have been very  
5 difficult for them, especially living with a budget that  
6 they themselves did not necessarily negotiate or plan for.

7 One of the things that I raised in the hearing  
8 this morning that I have a level of comfort on is the effort  
9 that will be undertaken in the future to really keep the  
10 professionals in a result-oriented mode and to evaluate the  
11 professional fees incurred when compared with the results  
12 achieved.

13 There's a lot to do in this case, I think  
14 everybody in this room knows it, but I have confidence at  
15 this point having discussed specifically with FTI what those  
16 efforts are going to all be about in the future.

17 And no, we didn't get anything we wanted, we  
18 wouldn't have gotten it from you no doubt, but I think that  
19 this is a good result and I think it's a very good result  
20 for all the creditors.

21 Time will tell I think how the professionals may  
22 react and so forth, and I hope people in good faith move  
23 forward and this case doesn't last beyond 2014 at the  
24 latest.

25 THE COURT: My judicial term ends on

1 September 5th, 2014.

2 MS. LEARY: That's a great deadline. So I hope it  
3 happens.

4 MR. ZIRINSKY: That's a hard deadline, Judge.

5 MS. LEARY: Yeah. Thank you, Your Honor.

6 THE COURT: All right. Has everybody had a chance  
7 to speak their piece? Evidently yes.

8 Mr. Williams, am I correct that you in  
9 consultation with the others will be working up an order  
10 that you can then represent to me that everybody is on board  
11 on?

12 MR. WILLIAMS: Yes, Your Honor, that would be our  
13 intention.

14 THE COURT: Very good. Okay, make it happen.

15 Under these circumstances I see no need for me to  
16 dictate anything that I was prepared to dictate, and I  
17 assume that at this point nobody wants to know.

18 MS. LEARY: I do.

19 UNIDENTIFIED SPEAKER: It's always nice to have a  
20 peak.

21 THE COURT: I'm going to exercise judicial  
22 restraint.

23 (Laughter)

24 THE COURT: All right, very well, we're adjourned.

25 (A chorus of thank you)



1 (Whereupon these proceedings were concluded at 2:32 PM)  
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I N D E X

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C E R T I F I C A T I O N

I, Sherri L. Breach and Dawn South, certify that the  
foregoing transcript is a true and accurate record of the  
proceedings.

Sherri L. Breach

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